No. 90-1271

FILED
FEB 11 1991
OFFICE OF THE CLERK

In The Supreme Court of the United States October Term, 1990

NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner,

v.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES S. WHITEHEAD
(Counsel of Record)
LINZEY D. JONES
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

WILLIAM B. POFF
CLINTON S. MORSE
WOODS, ROGERS & HAZLEGROVE
Post Office Box 720
Roanoke, VA 24004-0720

DOUGLAS A. SMOOT
JACKSON & KELLY
Post Office Box 553
Charleston, WV 25322

Counsel for Petitioner
NORFOLK AND WESTERN RAILWAY COMPANY

Date: February 8, 1991

American Reprographics Management, Inc.™ (312) 332-ARMI

QUESTION PRESENTED

Did Congress intend that a railroad brakeman, engaged in the interstate transportation of coal, can qualify as a "miner" within the meaning of Section 402(d) of the Black Lung Benefits Act, as amended, 30 U.S.C. 902(d) (1988), and thereby qualify for benefits under that Act?

LIST OF PARTIES AND RULE 29.1 LIST

The names of the parties to the proceeding are contained in the caption.

The common stock of petitioner Norfolk and Western Railway Company is wholly owned by Norfolk Southern Railway Company, and the common stock of Norfolk Southern Railway Company is wholly owned by Norfolk Southern Corporation. The other subsidiaries of petitioner and of its parent companies are:

I. Norfolk and Western Railway Company subsidiaries, other than wholly owned subsidiaries:

Wabash Railroad Company

II. Norfolk Southern Railway Company subsidiaries, other than wholly owned subsidiaries:

Highpoint, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
North Carolina Midland Railroad Company
South Western Rail Road Company
State University Railroad Company
Yadkin Railroad Company

III. Norfolk Southern Corporation subsidiaries, other than wholly owned subsidiaries:

Norfolk and Portsmouth Belt Line Railroad Company

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES AND RULE 29.1 LIST ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. The Court Of Appeals' Ruling That Congress Intended To Include Railroad Workers Within The Definition Of "Miner" In The Black Lung Benefits Act Is Inconsistent With The Act's Purpose And Contrary To Its Legislative History 7

II. The Federal Courts Have Issued Conflicting Interpretations Of The Coverage Of Railroad Workers Under The BLBA 14

CONCLUSION 18

Appendices:

Opinion of the Court of Appeals in *Norfolk & Western Railway Company v. Olen Roberson and Director, Office of Workers' Compensation Programs, United States Department of Labor*, 918 F.2d 1144 (4th Cir. 1990) 1a

Opinion of the United States District Court for the Western District of Kentucky in *Louisville and Nashville Railroad Company v. Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981) 11a

Decision of the Benefits Review Board in *Olen R. Roberson v. Norfolk & Western Railway Company, BRB No. 87-235 BLA* 17a

TABLE OF AUTHORITIES

CASES *Page*

Atchison T. & S.F. Railway v. Preston, 257 F.2d 933 (10th Cir. 1958) 9

Bay v. Merrill & Ring Logging Co., 243 U.S. 40 (1917) 9

Boston & Maine Railroad v. Armburg, 285 U.S. 234 (1932) 9

Browder v. Tipton, 630 F.2d 1149 (6th Cir. 1980) 12

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 7

Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 12

Fox v. Director, OWCP, 889 F.2d 1037 (11th Cir. 1989) 16

Lewis v. United States, 445 U.S. 55 (1980) 12

Louisville & N. R.R. v. Donovan, No. 80-0611-L(G), *rev'd. on other grounds*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) 5, 15

Louisville & N. R.R. v. Donovan, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) 15, 16

McCluskey v. Marysville & N. Ry., 243 U.S. 36 (1917) 9

Mills v. United States, 713 F.2d 1249 (7th Cir. 1983) 12

New York Cent. R.R. v. Windfield, 244 U.S. 147 (1917) 9

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 13

Roberts v. Weinberger, 527 F.2d 600 (4th Cir. 1975) 13

Simpson v. United States, 435 U.S. 6 (1978) 12

South Buffalo Ry. v. Ahern, 344 U.S. 367 (1953) 9

Page

Stroh v. Director, OWCP, 810 F.2d 61 (3d Cir. 1987) 16

United States v. American Trucking Assoc., 310 U.S. 534 (1940) 13

Urie v. Thompson, 337 U.S. 163 (1949) 9

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 2

STATUTES AND RULES

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-45 (1988) ..... *passim*

Section 401(a), 30 U.S.C. § 901(a) 7, 8

Section 402(d), 30 U.S.C. § 902(d) ..... *passim*

Section 422(a), 30 U.S.C. § 932(a) 4

Section 422(b), 30 U.S.C. § 932(b) 4

Black Lung Benefits Reform Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 8

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 ..... *passim*

Section 2(b), 92 Stat. 95 2

20 C.F.R. § 725.202(a) (1990) 5

20 C.F.R. § 725.491(a) (1990) 5

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 7

Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988) 3, 6, 9

45 U.S.C. § 51 9

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b)(3) (1988) 4

33 U.S.C. § 921(c) 5

Page

Railroad Retirement Act, 45 U.S.C. §§ 231-31u (1988) 3, 6, 10

45 U.S.C. § 231(a)(2)(i) 10

45 U.S.C. § 231(b)(2) 10

Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-67 (1988) 3, 6

45 U.S.C. § 351(d) 10

28 U.S.C. § 1254(1) (1988) 2

OTHER AUTHORITIES

Annotation, *Liability Under Federal Employers' Liability Act (45 U.S.C. §§ 51 et seq.) For Industrial or Occupational Disease or Poisoning*, 30 A.L.R. 3d 735 (1970 & Supp. 1989) 9

123 Cong. Rec. (1977) 12

H. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978), *reprinted* in 1978 U.S. Code Cong. & Admin. News 308 ..... 10, 13

House Comm. on Education and Labor, 96th Cong., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979) 8

H.R. Rep. No. 91-563, 91st Cong., 2d Sess. (1969), *reprinted in* 1969 U.S. Code Cong. & Admin. News 2503 8

H.R. Rep. No. 92-460, 92d Cong., 2d Sess. (1971) 8

H.R. Rep. No. 95-151, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 237 8

S. Rep. No. 92-743, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305 8

S. Rep. No. 95-209, 95th Cong., 1st Sess. (1977) 8, 11

No.

In The
Supreme Court of the United States
October Term, 1990

NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner,

v.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, NORFOLK AND WESTERN RAILWAY COMPANY ("NW"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on November 16, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 918 F.2d 1144 and is reprinted in the Appendix to this Petition ("App.") at 1a.

The September 29, 1989, decision of the United States Department of Labor Benefits Review Board, the administrative decision reviewed by the Court of Appeals, has not been reported and is reprinted in the Appendix at 17a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on November 16, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988). This petition has been filed within the time period provided by Supreme Court Rule 13.1.

STATUTES INVOLVED

Black Lung Benefits Act ("BLBA"), Section 402(d), 30 U.S.C. § 902(d) (1988), as amended by Section 2(b) of the Black Lung Benefits Reform Act of 1977 ("1977 Amendments"), Pub. L. No. 95-239, 92 Stat. 95:

> The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

STATEMENT OF THE CASE

I. Nature of the Case

In Section 2(b) of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, Congress amended the definition of the term "miner" in the Black Lung Benefits Act[1] to extend black lung benefits coverage to an individual "who works or has worked in . . . transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." The issue presented in this case is whether Congress thereby intended to extend such coverage to employees of common carrier railroads who have been exposed to coal dust as a result of their participation in over-the-road movements of unprocessed coal away from mine sites, notwithstanding the fact that those employees are already

---

[1] The basic statutory scheme of the Black Lung Benefits Act, as amended, 30 U.S.C §§ 901-45 (1988), is discussed in detail in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

fully protected against work-related illness and injury by a comprehensive scheme of federal legislation including the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988), the Railroad Retirement Act, 45 U.S.C. §§ 231-31u (1988), and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-67 (1988).

II. The Administrative Proceedings Below

Olen R. Roberson was employed by NW from 1947 until his retirement in 1979. Between 1956 and 1973 Roberson's work as a brakeman or conductor included work on NW trains that hauled unprocessed coal from various mines in Virginia to a coal preparation plant located several miles away from the mines. NW workers, including Roberson, would typically transport empty railroad cars from a railroad classification yard to designated tracks near the loading tipples at several mine sites where coal company employees would move and load the cars with raw coal. After distributing the empty cars to the various mine sites, Roberson would pick up and transport cars previously loaded and placed by coal company employees from the mine sites to designated tracks at the coal preparation plant several miles away. There the preparation plant employees would move the cars and dump the raw coal and, later, return the cars to the railroad filled with processed coal for delivery to consumers. Roberson also worked in transporting cars filled with processed coal to the ultimate consumer during this period. In performing these duties, Roberson was exposed to coal dust.

In all cases, Roberson's work was limited to the performance of traditional railroad brakeman/conductor duties such as checking and coupling air hoses on the cars, setting and releasing hand brakes, and operating switches. All train movements, including movements of unprocessed coal, were over trackage operated by NW as part of its interstate rail system. NW did not operate any coal mines during this period and does not operate any today. App. 3a-4a, 19a n.7.

Roberson filed a claim for disability benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. § 901 *et seq.* (1988) (the "Act" or "BLBA"), on February 24, 1978. Following a hearing, an administrative law judge ruled that Roberson was a "miner" within the meaning of Section 402(d) of the Act, 30 U.S.C. § 902(d), and is entitled to benefits, and that NW was

an "operator" responsible for the payment of those benefits within the meaning of BLBA Section 422(b), 30 U.S.C. § 932(b). App. 18a.

NW appealed that decision to the Benefits Review Board ("Board") pursuant to 30 U.S.C. § 932(a), which incorporates the administrative review procedures of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b)(3) (1988). In its September 29, 1989, decision, the Board affirmed the administrative law judge's determination that Roberson was a "miner." App. 22a. The Board reasoned that, because Roberson had been physically present at a mine where raw coal was being loaded and had engaged in its transportation to a coal preparation facility, he was a "miner" under the BLBA. App. 20a-22a.[2] The Board also upheld the determination that NW was an "operator" within the meaning of the Act and is responsible for the payment of disability benefits. Rather than interpreting the statutory definition of "operator", the Board relied on interpretive regulations of the Department of Labor that provided that "[i]t is Congress' intent that any employer of a miner as defined in 725.202(a) shall, to the extent appropriate, be considered an operator for purposes of this part and the provisions of this part shall be construed in accordance with this intent." 20 C.F.R.

---

[2] The Board used a "three-prong test" in analyzing these facts:

> (1) the coal with which the miner worked was still in the course of being processed, and not yet a finished product in the stream of commerce (status of the coal test); (2) the miner performed a function integral to the extraction or preparation of coal, and not one merely ancillary to the delivery and commercial use of processed coal (function test); and (3) the miner's work occurred in or around a coal mine or coal preparation facility (situs test).

App. 20a.

§ 725.491(a) (1990).[3] App. 24a.

III. The Court of Appeals' Decision

NW sought review of the Board's decision by the Fourth Circuit under 33 U.S.C. § 921(c). The court, in a November 16, 1990, opinion, affirmed the Board's decision in its entirety. App. 1a. The court ruled that the "plain language" of BLBA Section 402(d) includes railroad workers within the definition of "miner" because of its reference to "transportation." App. 5a. Accordingly, the court ruled that it had no need to consider the Act's legislative history. App. 7a. The court rejected NW's contention that such an expansive interpretation of the BLBA was inconsistent with Congress' overriding purposes in enacting the Act and, in particular, Congress' express intent, manifest in the legislative history of the 1977 Amendments, to exclude the employees of common carrier railroads from coverage. App. 7a n.3.[4]

REASONS FOR GRANTING THE WRIT

This case presents a question of overriding importance to the railroad industry. The erroneous Court of Appeals' decision, if not corrected, will expose the nation's railroads to thousands of claims for black lung benefits with total liability in the tens of millions of dollars. There are 64 black lung claims currently pending against NW and its affiliated carriers alone and at least

---

[3] The Department of Labor's regulations at 20 C.F.R. § 725.202 (a) (1990) provide in relevant part that:

> A "miner" for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. * * *

[4] The court also rejected NW's contention that it was not an "operator" within the meaning of the Act. While NW continues to assert that it was not an "operator" under the statutory definition, it has not included this issue as a question for the Court; a favorable ruling by the Court on the "miner" issue will result in NW not being deemed an "operator" even under the Department of Labor regulations. *See* 20 C.F.R. § 725.491 (a) (1990).

110 claims currently pending against other railroads throughout the industry. This highly controversial issue of the coverage of railroad employees has already resulted in conflicting federal court rulings and will be the subject of continuing litigation if not resolved by this Court. This Court should end the uncertainty in this area for railroads and claimants alike.

As shown below, the Court of Appeals' extension of BLBA coverage to railroad workers is manifestly inconsistent with Congress' limited purpose in passing the Act: the establishment of an adequate *federal* remedy for coal miners affected by pneumoconiosis because of the inadequacy of traditional *state* workers' compensation statutes. Interstate railroad workers, on the other hand, have for more than fifty years enjoyed comprehensive protection from the effects of work-related illness and injury under a comprehensive scheme of federal legislation: the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988); the Railroad Retirement Act, 45 U.S.C. §§ 231-31u (1988); and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-67 (1988).

Moreover, Congress unambiguously directed, at the time of the passage of the 1977 Amendments that added the word "transportation" in BLBA Section 402(d), that it did not intend thereby to include railroad workers within the Act's coverage. The Court of Appeals effectively ignored this determinative legislative history.

Finally, the Court of Appeals' decision conflicts with that of the only other federal court that has squarely addressed the inclusion of railroad workers within the definition of "miner" in the BLBA, *Louisville & N. R.R.* v. *Donovan,* No. 80-0611-L(G) (W.D. Ky. 1981), *rev'd on other grounds,* 713 F.2d 1243 (6th Cir. 1983), *cert. denied,* 466 U.S. 936 (1984).[5]

[5] The District Court decision in *Louisville & N. R.R.* is reprinted at App. 11a-16a.

I. The Court Of Appeals' Ruling That Congress Intended To Include Railroad Workers Within The Definition Of "Miner" In The Black Lung Benefits Act Is Inconsistent With The Act's Purpose And Contrary To Its Legislative History

The legislative history of BLBA Section 402(d) clearly demonstrates that Congress intended to exclude railroad workers from the coverage of the Act. In determining that the Benefits Review Board's contrary interpretation of the definition of "miner" was mandated by the plain language of the BLBA, the Court of Appeals looked solely at the word "transportation" without considering the historical development of the BLBA or Congress' underlying purpose. Moreover, in a totally illogical manner, the court severely limited its analysis of the legislative history of the Black Lung Benefits Reform Act of 1977, refusing to give due weight to the unambiguous expressions of Congressional intent to exclude railroad workers from the Act's coverage.[6]

The BLBA originated as Title IV of the Federal Coal Mine Health and Safety Act of 1969.[7] The stated purpose of Title IV was to provide a temporary benefit program, paid for by the federal government, to compensate coal miners suffering from pneumoconiosis, commonly known as black lung disease, and their surviving dependents. 30 U.S.C. §901(a). Congress found that such temporary federal legislation was needed because of the inadequacy of state workers' compensation programs for coal

---

[6] Because the Court of Appeals found that the "plain language" of the Act supported the Benefits Review Board's decision, the court did not base its decision on any deference to the Director's interpretation of "miner". In light of Congress' clearly expressed intent to exclude railroad workers from coverage under the BLBA, the Director's expansive interpretation of Section 402(d) is not entitled to any deference. As this Court explained in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984):

> The judiciary is the final authority on issues of statuory construction and must reject administrative constructions which are contrary to clear congressional intent . . . If a court, employing traditional tools of statutory construction, ascertains that Congress has an intention on the precise question at issue, that intention is the law and must be given effect.

[7] Pub. L. No. 91-173, 83 Stat. 742.

miners.[8] As originally enacted, BLBA only covered persons employed in "an underground coal mine." 83 Stat. 743.

In 1972, Congress amended Title IV to extend this benefits program beyond its original cut-off date and to require mine operators to shoulder the liability for claims after January 1, 1973.[9] Congress once again stated that its purpose in extending the program was to provide benefits because of the continued inadequacy of state workers' compensation laws.[10] Congress also extended the benefit program to miners who worked in strip mines. 86 Stat. 153.

In the Black Lung Benefits Reform Act of 1977, Congress once again amended BLBA, extending the program indefinitely, because of its finding that state workers' compensation programs continued to be inadequate.[11] The term "miner" in BLBA Section 402(d) was also changed to its present language to mean:

> Any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or *transportation in or around a coal mine,* to the extent such individual was exposed to coal dust as a result of such employment.

92 Stat. 95; emphasis added.

---

[8] Congress found that "few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents." 30 U.S.C. § 901(a). *See also* H.R. Rep. No. 91-563, 91st Cong., 2d Sess. 14 (1969), *reprinted in* 1969 U.S. Code Cong. & Admin. New 2503, 2516.

[9] Black Lung Benefits Reform Act of 1972, Pub. L. No. 92-303, 86 Stat. 150.

[10] *See* S. Rep. No. 92-743, 92d Cong., 2d Sess. 7, 20 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. New 2305, 2311, 2324, and H.R. Rep. No. 92-460, 92d Cong., 2d Sess. 12 (1971).

[11] *See* H.R. Rep. No. 95-151, 95th Cong., 2d Sess. 3, 4 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 237, 239-240; S. Rep. No. 95-209, 95th Cong., 1st Sess. 5 (1977), *reprinted in* House Comm. on Education and Labor, 96th Cong., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979) ("Black Lung Legis. Hist.").

At the time of its consideration of the 1977 Amendments, Congress made no findings questioning the adequacy of benefits under existing federal law for employees in the railroad industry affected by black lung disease. No witness testified at the hearings that led to the 1977 legislation that existing federal law did not adequately protect railroad workers suffering from any illness resulting from exposure to coal dust.

Indeed, in implementing this limited benefits program for individuals suffering from black lung disease who were inadequately protected under state law, there would have been no reason for Congress to extend coverage to railroad workers. Congress had already enacted a comprehensive scheme of related federal statutes providing benefits for employees in the railroad industry. Primary protection for disabled railroad employees is provided by the Federal Employers' Liability Act, 45 U.S.C. §§51-60 ("FELA"). For over eighty years, FELA has been the federal remedy to compensate railroad workers suffering from work-related injuries and occupational diseases, including lung diseases.[12] This federal legislation has long been held to supplant state workers' compensation laws.[13] However, because the FELA only protects employees of a "common carrier by railroad" (45 U.S.C. § 51), workers employed by coal mine operators in mine-site rail operations or in the transportation of coal to a preparation plant are not covered by FELA.[14] As is shown below, these are

---

[12] *See, e.g., Urie v. Thompson,* 337 U.S. 163, 180-87 (1949) (silicosis of the lungs allegedly resulting from inhalation of dust particles during railroad employment, covered by FELA); *Atchison T. & S.F. Ry. v. Preston,* 257 F.2d 933 (10th Cir. 1958) (pneumonitis and fibrosis of the lungs resulting from inhalation of smoke, fumes, and oil during railroad employment, covered by FELA); Annotation, *Liability Under Federal Employers' Liability Act (45 U.S.C. §§ 51 et seq.) For Industrial or Occupational Disease or Poisoning,* 30 A.L.R. 3d 735 (1970 & Supp. 1989).

[13] *See South Buffalo Ry. v. Ahern,* 344 U.S. 367, 371 (1953); *Boston & Maine R.R. v. Armburg,* 285 U.S. 234, 238-39 (1932); *New York Cent. R. R. v. Windfield,* 244 U.S. 147, 148-54 (1917).

[14] *See McCluskey v. Marysville & N. Ry.,* 243 U.S. 36, 40 (1917), and *Bay v. Merrill & Ring Logging Co.,* 243 U.S. 40, 42-43 (1917) (railroad owned by logging companies that exclusively transported goods of logging companies was not a "common carrier", and therefore employees of railroad were not protected by FELA).

precisely the types of workers the legislative history demonstrates Congress sought to protect in amending the BLBA in 1977.

Two other federal statutes, passed over fifty years ago, provide complementary protection exclusively for railroad workers. The Railroad Retirement Act, 45 U.S.C. §§231-31u, provides an annuity for disabled railroad employees. The Railroad Unemployment Insurance Act, 45 U.S.C. §§351-67, gives qualified railroad employees disability benefits for physical injury and disease. In enacting these statutes, Congress also excluded mine workers from coverage. Both the Railroad Retirement Act and the Railroad Unemployment Insurance Act exclude from coverage any individual engaged in the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple. 45 U.S.C. §§ 231(a)(2)(i), 231(b)(2), 351(d).

In sum, given the longstanding panoply of federal benefit programs for disabled rail workers, it is illogical to conclude that Congress would have intended to include railroad workers under BLBA without even addressing the potential for overlapping coverage, duplicative benefits, or the railroad employees' potential forfeiture of benefits under the Railroad Retirement Act or Railroad Unemployment Compensation Act in also claiming benefits under the BLBA as a "miner." For all these reasons, Congress' rationale for enacting the BLBA as a federal remedy for the deficiencies in state workers' compensation programs is clearly inapplicable to railroad workers.

Moreover, the legislative history of the 1977 Amendments conclusively demonstrates that Congress did not intend to include traditional railroad workers within the definition of "miner" in the BLBA. The House bill, H.R. 4544, made no change in BLBA's definition of "miner".[15] Upon receiving the House bill, the Senate struck out the House language and substituted the text of S.

---

[15] H. Conf. Rep. No. 864, 95th Cong., 2d Sess. 15 (1978), *reprinted* in 1978 U.S. Code Cong. & Admin News, 308, 309, *also reprinted* in Black Lung Legis. Hist. 886.

1538.[16] Section 2(b) of S. 1538 proposed to amend BLBA's definition of "miner" as follows:

> The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal. Such term also includes an individual who works or has worked in coal mine construction during any period such individual was exposed to coal dust in his or her employment.[17]

The Senate Report accompanying S. 1538 explained that the purpose of expanding the definition to include "transportation" workers was to bring within the coverage of the Act so-called "outside men" — coal mine employees who truck coal from the mine mouth to the "tipple" , where coal is collected and loaded on a train.[18] The Report expressly stated that the Senate Committee did not intend thereby to include railroad employees:

> *Definition of miner.* — The term is expanded in the Committee bill to include additional workers. Existing law limits the term miner to "any individual who is or was employed in a coal mine." The expanded definition in the committee bill includes . . . those who work or worked in a coal preparation facility or who transport coal, so that "outside men" — workers at the tipple and preparation plant workers, for example, are clearly covered as miners. . . . *The provision does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line unless such company also operates a mine.* Nor does it include such individuals not directly related to the production of coal such as coke oven workers. These exclusions are not the result of any judgment that such workers

---

[16] *Id.*

[17] *See* S. Rep. No. 95-209, 95th Cong., 1st Sess. 34 (1977), *reprinted in* Black Lung Legis. Hist. 637.

[18] *See* S. Rep. No. 95-209, 95th Cong., 1st Sess. 20-21 (1977), *reprinted in* Black Lung Legis. Hist. 623-24.

> should not be compensated for occupational disease — *they are merely beyond the scope of this legislation.*[19]

Senator Jennings Randolph of West Virginia, an ardent advocate of miners' rights and the floor manager of the 1977 black lung legislation,[20] repeated this understanding of the scope of the amended definition during the floor debate on the Senate bill:

> The term "miner" is redefined to include workers who process and transport coal, self-employed miners, coal mine construction workers are also included, but only to the extent that they worked in conditions substantially similar to conditions in underground mines. *Railroad, trucking, bargeline, and coke oven workers are not included in the definition.*[21]

The two bills were sent to a conference committee, which adopted the Senate's amendment to the definition of "miner" in all material respects, as the Joint Explanatory Statement of the Committee of Conference explained:

> *Miner*
>
> The House bill did not modify the existing definition of "miner" . The Senate amendment modified the definition to include all self-employed miners and specified that the term includes workers who are employed in or around a coal mine or preparation facility in the extraction, preparation, or transportation of coal, and construction workers who are exposed to coal dust in their employment.

---

[19] *Id.* Emphasis added.

[20] This Court has stressed that the explanatory comments of a bill's floor manager are entitled to substantial weight in the interpretation of a statute's legislative history. *Lewis v. United States,* 445 U.S. 55, 63 (1980); *Simpson v. United States,* 435 U.S. 6, 13 (1978); *Federal Energy Admin. v. Algonquin SNG, Inc.* 426 U.S. 548, 564 (1976); *see also Mills v. United States,* 713 F.2d 1249, 1253 (7th Cir. 1983); *Browder v. Tipton,* 630 F.2d 1149, 1151-52 (6th Cir. 1980).

[21] 123 Cong. Rec. 24,239 (1977), *reprinted in* Black Lung Legis. Hist. 668 (emphasis added).

> *The conference substitute conforms generally to the Senate amendment with an amendment to clarify that transportation and construction workers are covered only to the extent they work in or around a coal mine and are exposed to coal dust.*[22]

Comparison of the Senate's language to that adopted by the Conference Committee and enacted into law reveals that the only differences are that the word "transportation" was shifted from the first to the second sentence of the definition and the phrase "during any period" in the second sentence was changed to "to the extent." The Conference Committee report explained that the relocation of the word "transportation" was solely to "clarify", *i.e.* to narrow, the Senate's language to make clear that "transportation and construction workers are covered only to the extent they work in or around a coal mine and are exposed to coal dust."[23]

The Court of Appeals rejected this definitive legislative history out of hand.[24] It concluded that the plain meaning of the phrase "transportation in or around a coal mine" manifested a clear Congressional intent to include railroad workers within the Act's coverage. App. 5a, 6a. In reaching this conclusion, the court failed to follow this Court's oft-repeated admonition that "[i]n expounding a statute [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citing cases).[25]

---

[22] H. Conf. Rep. No. 864, 95th Cong., 2d Sess. 15 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 308-09; Black Lung Legis. Hist. 886 (emphasis added).

[23] *Id.*

[24] Indeed, the court supported its decision by principally relying on its earlier decision in *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975), a decision predating the 1977 Amendments, in which the court had found that a truck driver could be a "miner" under the BLBA.

[25] *See also United States v. American Trucking Assoc.*, 310 U.S. 534, 543 (1940) (". . . even when the plain meaning . . . [does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal word.").

The phrase "transportation in or around a coal mine" is nowhere defined in the Act. Its "plain meaning" does not compel the inclusion of railroad employees exclusively performing traditional common carrier rail transportation functions. Nor is the inclusion of railroad workers consistent with the limited purpose of the Act: to provide a federal substitute for inadequate state workers' compensation laws. Accordingly, a court must resort to the legislative history to determine Congress' intent.

The Court of Appeals disingenuously dismissed in a footnote the definitive legislative history of the 1977 Amendments discussed above, ruling that the decisive Senate report and the comments of Senator Randolph could be ignored because the "Senate bill . . . did not prevail." App. 7a n.3. In fact, however, the legislative history demonstrates that the Senate bill did "prevail" with respect to the modifications to BLBA's definition of "miner" ; the Senate bill was the sole source for the inclusion of transportation workers within BLBA's coverage. Congress' intent to exclude railroad workers from such coverage cannot have been more clearly expressed. The Court of Appeals' decision interprets Section 402(d) in a way that is totally inconsistent with the express purpose of the legislation and contrary to the relevant legislative history. For this reason, a writ of certiorari should be issued to review the decision.

II. The Federal Courts Have Issued Conflicting Interpretations Of The Coverage Of Railroad Workers Under The BLBA.

This Court also should review the Court of Appeals' decision because the federal courts have issued conflicting decisions interpreting the coverage of the BLBA with respect to railroad workers. Prior to the Court of Appeals' decision herein, a federal District Court had ruled that railroad workers are not included within the definition of "miner" in BLBA Section 402(d).[26]

---

[26] The instant Fourth Circuit decision is the first appellate court case to address this issue on the merits.

In 1979 the Department of Labor adopted an internal BLBA guideline interpreting "miner" in light of the 1977 Amendments in a way that would include certain railroad employees.[27]

The railroad industry promptly filed suit challenging this interpretation. In *Louisville & N. R. R. v. Donovan,* No. 80-0611-L(G) (W.D. Ky 1981), the District Court ruled that Congress had not intended to include railroad employment within the Act's coverage and enjoined the Department of Labor from applying the Act to railroad employees:

> It is clear from the legislative history of the 1978 amendment that Congress did not intend the amended definition to include railroad employees. Senate Report No. 95-209 at pages 20-21 states that the amended definition would include so-called "outsidemen," that is, persons working for a coal mining company outside the mine area. However, the Senate Report states that "the provision does not contemplate inclusion of those workers employed by a railroad. . . ." This was confirmed on the Senate Floor by the floor manager, Senator Randolph. 123 Cong. Rec. p. 24239. If Congress had intended the 1978 amendment to include employees from other industries such as railroads, all Congress had to do was say so. It's just that simple. To the contrary; an all-inclusive amendment was introduced to Congress in 1972 to provide Black Lung benefits to any individual employed in any industry who contracted Black Lung. This amendment was not

---

[27] The guidelines interpreted "transportation of coal" to include:

> . . . transportation from extraction site to preparation plant or tipple, and any transportation of coal up to the time when the extraction and preparation of the coal has been completed or the time when the extracted coal enters into the stream of commerce. Thus, persons engaged in transportation of coal from a mine site to the ultimate consumer of the coal, or in functions integral to that activity, would not be covered, even if part of their time is spent in or around the mine site. However, those engaged in transport functions between the extraction site and the tipple would be covered where their work is integral or necessary to the preparation or extraction process.

See Louisville & N. R.R. v. Donovan, 713 F.2d 1243, 1244 n.1 (6th Cir. 1983), *cert. denied,* 466 U.S. 936 (1984).

enacted. *Montel v. Weinberger*, 546 F.2d 679 (4th Cir. 1976).

* * *

For all the reasons stated above, the Court holds that the term "miner" in 30 U.S.C. § 902(d) does not include employees of railroads.

App. 13a-14a.[28]

Moreover, the Court of Appeals' decision below, in refusing to credit the 1977 Senate report as the definitive statement of Congress's intent with respect to the occupations included within the expanded definition of "miner", conflicts sharply with the decision of the Eleventh Circuit in *Fox v. Director, OWCP*, 889 F.2d 1037 (11th Cir. 1989).[29] In *Fox*, the Eleventh Circuit considered whether coke oven workers were within BLBA's coverage. In reaching this determination, the court recognized that reliance on the Senate report was critical:

> The legislative history of the Act indicates that while Congress recognized coal dust adversely affects the health of workers in many occupations, coverage of coal preparation activities is contingent on such activities being an integral part of the coal production process. . . . This intent to limit the coverage of the Act is apparent from the following excerpt explaining the expanded definition of the term "miner" under the

---

[28] On appeal, the Sixth Circuit reversed the District Court's judgment for lack of subject matter jurisdiction. *Louisville & N. R.R. v. Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984). The Sixth Circuit concluded that the railroads were required to exhaust the administrative review procedures of the Act before challenging the Department of Labor's interpretation. The Sixth Circuit questioned the District Court's interpretation of the legislative history of the 1977 Amendments. 713 F.2d at 1247-49. However, the Sixth Circuit acknowledged that the issue of the proper interpretation of the amended definition of "miner" was "not properly before us" and, accordingly, that it did not purport to be "making any definitive construction of the BLBA." 713 F.2d at 1248, 1249.

[29] The only other court that has found certain transportation workers to be "miners" within the meaning of the BLBA, as amended in 1977, has also failed to consider this definitive legislative history. *See Stroh v. Director, OWCP*, 810 F.2d 61 (3d Cir. 1987) (self-employed truck driver is a "miner" within the meaning of the BLBA).

> Black Lung Benefits Reform Act of 1977: "The provision does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line . . . Nor does it include such individuals not directly related to the production of coal such as coke oven workers. These exclusions are not the result of any judgment that such workers should not be compensated for occupational disease - they are merely beyond the scope of this legislation." . . . . Where the legislature has clearly established a boundary, that limit may not be judicially extended.[30]

889 F.2d at 1040-41, *quoting* S. Rep. No. 95-209, 95th Cong., 1st Sess. 21 (1977) (emphasis and footnote omitted).

Accordingly, Petitioner NW submits that a writ of certiorari should issue because the federal courts have issued conflicting interpretations concerning Congress' intent in covering railroad workers under the BLBA.

---

[30] Respondent Director of the Office of Workers' Compensation Programs urged the Court of Appeals below to reject N&W's reliance on the 1977 Senate Report because, he argued, the Senate bill had been rejected by Congress. App. 7a, n. 3. However, in *Fox* the Director specifically told the Eleventh Circuit that the definition of "miner" and other terms of the Act "must be read in the context of the meaning intended by Congress. . . . This intent to limit coverage of the Act is clearly seen in the following discussion explaining the expanded definition of the term 'miner' under the Black Lung Benefits Reform Act of 1977," referring to the same excerpt from the 1977 Senate Report relied upon herein by N&W. Brief for Director, OWCP, at 10, *Fox v. Director, OWCP*, 889 F.2d 1037 (11th Cir. 1989).

CONCLUSION

The Court of Appeals' decision interprets the definition of "miner" found in Section 402(d) of the BLBA in a way that is totally inconsistent with the relevant legislative history. This interpretation exposes the rail industry to huge liability and the expense of litigating thousands of claims. The federal courts have reached inconsistent interpretations of this critical term. For these reasons, Petitioner Norfolk and Western Railway Company respectfully submits that its petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES S. WHITEHEAD
(Counsel of Record)
LINZEY D. JONES
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

DOUGLAS A. SMOOT
JACKSON & KELLY
Post Office Box 553
Charleston, WV 25322

WILLIAM B. POFF
CLINTON S. MORSE
WOODS, ROGERS & HAZLEGROVE
Post Office Box 720
Roanoke, VA 24004-0720

Counsel for Petitioner
NORFOLK AND WESTERN RAILWAY COMPANY

Date: February 8, 1991

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the Court of Appeals in *Norfolk & Western Railway Company v. Olen Roberson and Director, Office of Workers' Compensation Programs, United States Department of Labor*, 918 F.2d 1144 (4th Cir. 1990)..... 1a

Opinion of the United States District Court for the Western District of Kentucky in *Louisville and Nashville Railroad Company v. Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981)..... 11a

Decision of the Benefits Review Board in *Olen R. Roberson v. Norfolk & Western Railway Company, BRB No. 87-235 BLA* 17a

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 89-2192

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

versus

OLEN R. ROBERSON; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents,

ASSOCIATION OF AMERICAN RAILROADS,

Amicus Curiae.

On Petition for Review of an Order of the Benefits Review Board. (87-235-BLA)

Argued: April 4, 1990 Decided: November 16, 1990

Before WIDENER, PHILLIPS, and WILKINSON*, Circuit Judges.

Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge Phillips joined.

---

* Judge Wilkinson was a member of the panel which heard oral argument in the case, but he later recused himself. The decision is filed by a quorum of the panel. 23 U.S.C. 46(d).

ARGUED: William Beverly Poff, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Petitioner. Elizabeth Hopkins, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Lawrence Lee Moise, III, VINYARD AND MOISE, P.C., Abingdon, Virginia, for Respondents. ON BRIEF: Clinton S. Morse, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia; Douglas A. Smoot, JACKSON & KELLY, Charleston, West Virginia, for Petitioner. Robert P. Davis, Solicitor of Labor, Allen H. Feldman, Associate Solicitor for Specital Appellate and Supreme Court Litigation, Steven J. Mandel, Counsel for Appellate Litigation, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Robert Austin Vinyard, VINYARD AND MOISE, P.C. Abingdon, Virginia, for Respondents. J. Thomas Tidd, Daniel Saphire, ASSOCIATION OF AMERICAN RAILROADS, Washington, D.C.; Ralph J. Moore, Jr., John Townsend Rich, Alok Ahuja, SHEA & GARDNER, Washington, D.C., for Amicus Curiae.

WIDENER, Circuit Judge:

Norfolk & Western Railway Company (N & W) petitions for review of a decision and order of the Benefits Review Board affirming an order of an Administrative Law Judge (ALJ) that awarded benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* (Act), to Olen R. Roberson, a retired N & W employee. Both the ALJ and the Board concluded that N&W qualified as a coal mine operator under the Act and that Roberson qualified as a coal miner who was entitled to benefits. We affirm.

Olen R. Roberson worked as a brakeman and conductor for N & W from 1947 to 1979. The parties do not dispute that the initial and final periods of his employment, from 1947 to 1956 and from 1973 to his retirement in 1979, did not constitute coal mine employment. Between 1956 and 1973, however, Roberson worked on N & W runs that delivered empty railroad cars to mine sites to be loaded with raw coal and which then hauled the raw coal from the mines to a coal preparation plant where the coal was washed, cleaned, graded, and reloaded for further shipment.

One of the principal crews with which Roberson worked made the "Carbo Run," which originated in Carbo, Virginia.[1] This crew traveled from Carbo thirty miles to Richlands, Virginia, where it picked up empty coal cars and delivered them to a Jewel Ridge Coal Company mine located some six miles away. The crew then transported the raw coal back to Carbo to the Clinchfield Coal Company preparation plant, a distance of thirty-six miles. The entire run took twelve to fourteen hours to complete. Roberson's crew also transported raw coal to the Clinchfield preparation plant from mines in Duty, Virginia, an eight to ten mile run that could be accomplished two or three times in one day.

Roberson's duties included coupling and uncoupling high pressure air hoses between the cars, which blew coal dust into the air, setting and releasing brakes, and obtaining loading numbers and tags from the individual cars. Because most of Roberson's tasks were performed while the train was stationary,

---

[1] The ALJ credited Roberson with 14 years of coal mine employment based on his testimony that he worked on the Carbo Run a total of 14 years.

Roberson spent a significant portion of his workday at the mine sites and the preparation plant. At times, Roberson "walked" a hundred cars at a time. In addition, coal dust also blew off the tops of the loaded railroad cars during the trips between the mines and the preparation plant. Thus, although Roberson never participated in the actual loading or unloading of coal, he was continually exposed to large amounts of coal dust. Roberson applied for black lung benefits in 1978, one year before his retirement.

The ALJ determined that N & W's coal hauling activities qualified it as the responsible operator under the Act and that Roberson qualified as a miner who was entitled to benefits. Finally, the ALJ concluded pursuant to the interim presumption in 20 C.F.R. § 727,203(a) that Roberson is totally disabled from pneumoconiosis due to coal mine employment, and that N & W failed to rebut the presumption.[2] The Board found that each of the ALJ's conclusions was supported by substantial evidence. See 33 U.S.C. § 921(b)(3).

Our review of the Board's order is governed by section 21 of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 921. 30 U.S.C. § 932(a). Specifically, we must uphold the Board's resolution of questions of statutory construction or application of the Act to a specific set of facts if it is supported by a reasonable factual and legal basis. *Eplion v. Director, OWCP*, 794 F.2d 935, 936 (4th Cir. 1986). In addition, the Director urges us to adopt the Board's interpretation of the Act. Although the Board's interpretation standing alone is not entitled to special judicial deference, if the Director urges us to adopt the Board's interpretation, our analysis is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 208 (4th Cir. 1990).

Under *Chevron* we first must ask whether Congress directly has addressed the precise issue in dispute. *Chevron*, 467 U.S. at 842. If so, the court and the agency must give effect to unambiguous Congressional intent. *Chevron*, 467 U.S. at 842-

---

[2] N & W does not challenge on review the findings of the ALJ and Board on this issue, so the Board's finding of disability stands as ordered.

43. If Congressional intent is unclear or ambiguous, however, we must determine only whether the Director's interpretation is based on a permissible construction of the Act; we may not substitute our own construction of the Act for a reasonable one made by the Director. *Chevron*, 467 U.S. at 844; *Howard*, 904 F.2d at 209.

Our starting point, of course, is the language of the Act, which defines a miner as

> any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction *or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment* .

30 U.S.C. § 902(d) (emphasis added). Thus, the plain language of the statute requires the inclusion in the definition of miner of transportation workers who were involved "in the extraction or preparation of coal," who worked "in or around a coal mine," and who were "exposed to coal dust as a result of such employment." Because N & W does not dispute Roberson's exposure to coal dust, we turn to the other two inquiries, which often are described as the requirements of situs and function. *Eplion*, 794 F.2d at 937.

In affirming an order of the Board denying black lung benefits to a claimant whose job entailed knocking open doors to railroad cars so that coal could be loaded into barges, we emphasized that "[claimant] was not involved in transporting the coal before it was prepared. The coal was already processed and prepared for market before [claimant] had any contact with it." *Eplion*, 794 F.2d at 937. We concluded in *Eplion*, therefore, that the claimant failed to qualify as a miner under the Act because he did not meet the situs and function tests set forth in the statute.

In contrast to *Eplion*, the ALJ's undisputed findings of fact in this case are that Roberson was involved in hauling raw coal from extraction sites (mines) to the preparation plant, which also

is considered a coal mine under the Act. See 30 U.S.C. § 802(h)(2). Transporting raw coal to a preparation plant plainly is part of the preparation of coal, and Roberson therefore satisfies the function test. In addition, the ALJ specifically found that, because Roberson did a lot of his work while the train was parked at the mine sites and the preparation plant, Roberson spent "a significant portion of time" in or around a coal mine, as defined by the statute. Therefore, Roberson also satisfies the situs test.

Except for the mode of transportation involved, and perhaps the distance traveled, this case is indistinguishable from *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975). In *Roberts* we determined, three years before the 1978 amendment to the statute expressly included transportation workers in the definition of miner, that a truck driver who hauled coal between a strip mine and the tipple qualified as a miner entitled to benefits under the Act. Just as Roberson did in the case at hand, the truck driver in *Roberts* hauled coal from the extraction site to the tipple, where it was processed, graded, and reloaded for further shipment. *Roberts*, 527 F.2d at 601. We reasoned that the driver's functions

> were part of the process of "extracting the coal and preparing the coal so extracted." The coal was not extracted and prepared until it was taken from the mine to the place where it was processed and graded so as to be in condition for delivery to distributors and consumers.

Roberts, 527 F.2d at 602. Because we concluded in *Roberts* that the Act "is unambiguous in extending coverage" to the truck driver, *Roberts*, 527 F.2d at 602, we have little difficulty in concluding that the plain language of the Act, expecially when reinforced by the 1978 amendment, manifests a clear Congressional intent to include in the definition of miner a small group of transportation workers of which Roberson was a member.

N & W advances several arguments in an attempt to distinguish *Roberts* and establish that railroad employees are fundamentally different from other transportation workers. First, it relies extensively on the legislative history to the 1978 amendments to the Act. Because we conclude that the plain language of the Act supports the Board's decision, however, we

"must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843, and we have no need to resort to the Act's legislative history.[3]

Second, N & W argues that allowing a railroad employee to recover under the Act would be inconsistent with other federal legislation that already protects railroad employees from disability or injury, such as the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, the Railroad Retirement Act, 45 U.S.C. §§ 231 *et seq.*,[4] and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351 *et seq.* We disagree. Not only do the statutes

---

[3] Even if we found the language of the Act unclear and resorted to the legislative history, our result would be no different. N & W relies on Senate Report No. 209, 95th Cong., 1st Sess. 21 (1977), which states concerning the definition of miner that "[t]he provision does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line unless such company also operates a mine." The floor manager of the Senate bill, Senator Randolph, made a similar statement during floor debate. The Senate bill, however, did not prevail, and the subsequent Conference Committee Report contains no language excluding railroad workers or any other specific set of transportation workers from the definition of miner; indeed, the Conference Report sticks closely to the literal language of the statute, as have we. H. Conf. Rep. No. 864, 95th Cong., 2d Sess., *reprinted in* 2 U.S. Code Cong. & Admin. News 308-09 (1978). Because the Conference Report "represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of Congressional intent behind the enactment of a statue." *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied* 479 U.S. 868 (1986). Thus, even if we looked to the legislative history for guidance, the Director's interpretation of the Act still would be a permissible one that we should not set aside. *Chevron*, 467 U.S. at 843-44. N & W's reliance on *Fox v. Director, OWCP*, 889 F.2d 1037 (11th Cir. 1989), which cited the Senate Report in the course of determining that a coke oven worker was not a miner, is unpersuasive. The *Fox* court did not explain why it resorted to the legislative history of a version of a bill that was not adopted, quite possibly because the passage was not essential to the court's holding. In light of the fact that a coke oven is a consumer of coal, the *Fox* court understandably found that the coke oven worker was not involved in the preparation of coal under the Act. *Fox*, 889 F.2d at 1042-43 ("[T]he processing and use of the minerals by subsequent consumers is not a part of that process.") 889 F.2d at 1040.

[4] N & W has moved to supplement the appellate record in this case to include a letter indicating that Roberson was granted an annuity pursuant to the Railroad Retirement Act based on occupational disability. Although we grant N & W's motion to supplement the record, the letter does not change our analysis for the reasons indicated in the text.

differ in certain material respects (the FELA, for example, requires employer negligence, 45 U.S.C. § 51, while the Black Lung Act does not), none of the other statutes indicate that Congress intended them to preclude the availability of other federal remedial legislation. Instead, the FELA, upon which N & W principally relies, does just the opposite. See 45 U.S.C. § 58 ("Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress."). So that argument is, we think, without merit.

N & W also contends that, as an industry exclusively regulated by the Interstate Commerce Commission (ICC), railroads are uniquely different from other carriers because all their services are considered to be part of interstate commerce. We know of no part of the Act, the regulations, or any reported case interpreting the Act or regulations, however, that distinguishes a common carrier or transportation worker on the basis of connections with interstate commerce. Indeed, in *Roberts* we found that the truck driver qualified as a miner despite conflicting evidence as to whether he was employed by the coal company or a trucking subcontractor. *Roberts,* 527 F.2d at 602. The Fifth Circuit recognized, in *Freeman v. Califano*, 600 F.2d 1057, 1060 & n.2 (5th Cir. 1979), that *Roberts* implicitly rejected an argument that the nature of the employer could make for differing results ("The Fourth Circuit evidently deemed this question unimportant . . ."), and went on to hold that "nothing in [the Act] or the regulations indicates that application of the presumption should turn on the nature or the employer's business rather than the nature and location of the work done." Also, we do not think that the result in *Roberts* would have been different had a state line lain between the mine and the tipple, and we reject N & W's argument.

Within N & W's many references to the ICC and the federal regulatory statutes, however, is a simpler and somewhat more persuasive argument. In the midst of its recitation of statutes and regulations, N & W also argues that the interstate commerce aspects of its business, and the fact that the Carbo Run covered thirty-six miles, take Roberson's employment out of the statutory definition of employment "in or around a coal mine" and "in the extraction or preparation of coal." As we noted earlier,

however, the ALJ found, and N & W does not dispute, that Roberson spent a significant portion of his workday actually at the mines and preparation plant, and that Roberson was engaged in hauling raw coal between two statutory "mines." Thus, N & W's argument, though undoubtedly valid with respect to many of its employees who haul coal, is without merit as to this particular claimant.

Even if Roberson meets the statutory definition of miner, N & W also asserts that it cannot be an operator under the Act. The relevant statute defines operator as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine *or any independent contractor performing services or construction at such mine.*" 30 U.S.C. § 802(d) (emphasis added). In addition, the applicable regulations provide that "any employer of a miner as defined in § 725.202(a) shall, to the extent appropriate, be considered an operator for the purposes of this part. . . ." 20 C.F.R. § 725.491(a). Because we have concluded that Roberson meets the statutory definition of miner, the regulation defines N & W as an operator if "appropriate."

In *Old Dominion Power Co. v. Donovan*, 772 F.2d 92, 96 (4th Cir. 1985), we concluded that Congress intended to include within the definition of operator only those independent contractors who maintain a continuing presence at a mine. Because Old Dominion's employees normally were present at the mine site only once a month to read the meter, we concluded that Old Dominion was not an operator under the statute. By contrast, the ALJ found here that N & W maintained a continuing presence at the mine site and performed services essential to the preparation of the coal. We conclude that N & W appropriately was considered the responsible operator under the Act. [5]

---

[5] N & W argues that classifying it as an operator would place the railroad in violation of federal law because railroads are prohibited from transporting commodities that are "manufactured, mined, or produced by the carrier or under its authority." 49 U.S.C. § 10746. However, neither Roberson nor the Director ever has asserted that N & W actually mined or supervised the mining of coal, and considering N & W an operator under the plain language of the Act does not alter what the parties do not dispute. The fact that an employer may be a statutory operator under 30 U.S.C. § 802(d) and 20 C.F.R. § 725.491(a) does not mean that the coal involved was "manufactured, mined or produced" by the employer within the meaning of 49 U.S.C. § 10746.

In conclusion, our holding is necessarily narrow. In the ordinary case a railroad employee engaged in the transportation of coal may well not qualify for benefits under the Act. The demanding tests of function and situs must be met, as they were in this case. After the coal is prepared and reloaded for shipment, a railroad employee would not satisfy the function test. And the possibility of satisfying the situs requirement diminishes as the distance traveled on the rails increases, rendering the employment other than "in or around a coal mine." If a claimant fulfills all the statutory requirements, however, as Roberson has here, we decline to hold that his status as a railroad employee negates his recovery of benefits under the Act to which he otherwise would be entitled.

The order of the Board which has been reviewed is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action
No. 80-0611-L(G)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Plaintiffs,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,
Defendants.

MEMORANDUM OPINION

This is an action for declaratory judgment by the Plaintiffs, railroads which transport coal in interstate commerce, against officers and agencies of the United States charged with responsibility for the administration and enforcement of certain provisions of the Federal Mine Health and Safety Act, 30 U.S.C. § 801, *et seq.*, as amended (the "Act"). The question at issue is whether a railroad employee can be a "miner" within the meaning of the Act, and whether a railroad engaged in the transportation of coal can be a "mine operator" who is liable for the payment of Black Lung benefits under the Act. This case presents a justiciable controversy because there are more than 700 pending claims for payment of Black Lung benefits under the Act that have been filed by former and current employees of the Plaintiffs.

This case is before the Court on Plaintiffs' Motion for Summary Judgment, and Defendants' Cross-Motion for Summary Judgment. The parties agree that there is no genuine issue as to any material fact, and this case should be decided as a matter

of law. For the reasons stated herein, the Court holds that Plaintiffs' Motion for Summary Judgment must be granted and Defendants' Motion for Summary Judgment must be denied.

The Court has heretofore denied Defendants' Motion to Dismiss. Defendants argued that the Court has no jurisdiction because the Plaintiffs have not exhausted their administrative remedies. However, this controversy presents purely legal issues involving the construction of a statute, and the pendency of over 700 claims for Black Lung benefits makes these issues fit for judicial decision. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Exxon Corporation* v. *Federal Trade Commission*, 588 F.2d 895 (3rd Cir. 1978). Defendants also based their Motion to Dismiss on the ground the Plaintiffs do not have standing. The Court has heretofore denied such motion because the Plaintiffs have sufficiently alleged that they have been injured by Defendants actions. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). Because this case does not involve the merits of any particular claim for Black Lung benefits, and the presence of any particular claimant would not contribute toward a resolution of the legal issues presented here, the Court has heretofore denied Defendants' Motion to Dismiss under F.R.C.P. 19 and has also heretofore denied the motion of one Ellis Barker to intervene under F.R.C.P. 24.

Plaintiffs have alleged that they have been injured by Defendants' interpretations of the Act. The Department of Labor adopted an internal guideline in 1979 that included within the definition of "miner" persons performing transportation functions with respect to coal after it left the tipple or coal preparation plant. Circular 79-3, Exhibit A to Complaint. In 1981, the Department of Labor narrowed this internal guideline so that persons performing transportation functions are considered "miners" only as to functions performed between the coal extraction site and the tipple. BLBA Procedure Manual, Appendix A to Defendants' Points and Authorities in Support of Motion to Dismiss. However, the Defendants have admitted that employees of the Plaintiff railroads could be considered

"miners" in certain circumstances under the 1981 internal guideline, and railroads could be liable for payment of Black Lung benefits thereunder. Defendants' Answer to Plaintiffs' Request for Admission, Paragraph 1.

As originally enacted in 1969, the Act defined the term "miner" to mean "any individual who is or was employed in an underground coal mine." This definition was amended in 1972 to delete the word "underground." This definition was again amended in 1978 to include the following persons:

> Any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment. 30 U.S.C. § 902(d).

It is clear from the legislative history of the 1978 amendment that Congress did not intend the amended definition to include railroad employees. Senate Report No. 95-209 at pages 20-21 states that the amended definition would include so-called "outside men," that is, persons working for a coal mining company outside the mine area. However, the Senate Report states that "the provision does not contemplate inclusion of those workers employed by a railroad . . . ." This was confirmed on the Senate Floor by the floor manager, Senator Randolph. 123 Cong. Rec. p. 24239. If Congress had intended the 1978 amendment to include employees from other industries such as railroads, all Congress had to do was say so. It's just that simple. To the contrary; an all-inclusive amendment was introduced in Congress in 1972 to provide Black Lung benefits to any individual employed in any industry who contracted Black Lung. This amendment was not enacted. *Montell* v. *Weinberger*, 546 F.2d 679 (6th Cir. 1976).

An additional factor that must be given weight is that benefits for injured and disabled railroad employees are provided, and were provided prior to passage of the Act, under the Federal Employees Liability Act, 45 U.S.C. § 51, *et seq.*, the

Railroad Retirement Act, 45 U.S.C. § 231, *et seq.*, and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351, *et seq.* In contrast, Congress made a finding when it enacted the Act in 1969 that coal miners did not have a disability benefit program under state workers compensation laws. 30 U.S.C. § 901(a).

For all the reasons stated above, the Court holds that the term "miner" in 30 U.S.C. § 902(d) does not include employees of railroads.

Furthermore, the Plaintiff railroads are not liable for Black Lung benefits unless they are "operators" within 30 U.S.C. § 802(d). The statute that covers liability for benefits, 30 U.S.C. § 932, provides that "operators" are liable for payment of benefits. 30 U.S.C. § 932(b) provides that "each such operator shall be liable for and shall secure the payment of benefits." 30 U.S.C. § 932(c) provides that "benefits shall be paid during such period by each such operator." 30 U.S.C. § 932(h) provides that the Secretary of Labor may provide for apportionment of liability for benefits "among more than one operator." It is true that 30 U.S.C. § 932(b) refers to an "employer other than an operator of a mine" in the context of securing the payment of benefits. However, such reference is apparently meant to distinguish between the two categories of "operators" included within 30 U.S.C. § 802(d). Under 30 U.S.C. § 802(d), an "operator" can be a person [1] who operates, controls or supervises a mine, or [2] who performs services or construction as an independent contractor at a mine. An "employer other than an operator of a mine" is a person who falls within category [2] of "operators" under 30 U.S.C. § 802(d), whereas "an operator of a mine" would be a person who falls within category [1] of "operators" under such statute. See Remarks of Representative Perkins, 124 Cong. Rec. p. H1029. The reference to "an employer other than an operator of a mine" in 30 U.S.C. § 932(b) does not detract from the fact that § 932 contemplates that only "operators" are liable for Black Lung benefits.

An "operator" must, by definition under 30 U.S.C. § 802(d), be involved in work "at" a coal mine, or must control or supervise a coal mine. A "coal mine" includes facilities or other properties used for extracting coal or preparing coal so extracted. 30 U.S.C. § 802(h)(1). A railroad obviously does not extract coal, nor does the work done by a railroad in connection with transporting coal fall within the definition of "work of preparing the coal" set forth in 30 U.S.C. § 802(i). Congress has said that "operators" are liable for benefits, and it is clear that Congress intended this liability to be borne by the coal industry and not any other industry. *National Independent Coal Operators Association* v. *Brennan*, 372 F.Supp. 16 (D. D.C. 1974). For all these reasons, the Court holds that a railroad is not an "operator" within the meaning of 30 U.S.C. § 802(d).

Finally, Plaintiff railroads have contended that it would be unconstitutional to apply the Act to them, because they were not given fair notice that the Act would be applied to them and they were not given an equal opportunity to secure the payment of benefits as was the coal mining industry. The Plaintiff railroads have also contended that application to them of the presumptions contained in 30 U.S.C. § 921(c) would deny them due process of law, because there is no rational basis for the application of those presumptions to railroad employees. These arguments may have merit, but there are sufficient non-constitutional grounds for deciding this case, so the Court should not and does not reach the constitutional questions. *Dawson* v. *Myers*, 622 F.2d 1204 (9th Cir. 1980).

The foregoing shall constitute the Court's findings of fact and conclusions of law. The Court will enter judgment in favor of the Plaintiffs and against the Defendants. Counsel for the

Plaintiffs will tender a judgment in conformity with the foregoing findings and conclusions.

Date 10/5/81

/s/ James F. Gordon
JAMES F. GORDON
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of record.

U.S. Department of Labor

Benefits Review Board
1111 20th St., N.W.
Washington, D C 20036

BRB No. 87-235 BLA
OWCP No. 223-12-5682

OLEN R. ROBERSON
Claimant-Respondent

v.

NORFOLK AD WESTERN RAILWAY COMPANY
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Douglas A. Smoot (Jackson, Kelly, Holt & O'Farrell), Charleston, West Virginia, for employer.

Nicholas J. Levintow (Robert P. Davis, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Jeffrey J. Bernstein, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Larry C. Deener (Landrum, Shouse & Patterson), Lexington, Kentucky and J. Lawson Johnston (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for amicus curiae.

Before: SMITH, Acting Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (83-BLA-7557) of Administrative Law Judge Lawrence E. Gray on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C §901 *et seq.* (the Act). Pursuant to the Board's Order dated February 24, 1989, oral argument was held in Abingdon, Virginia on May 3, 1989.

The administrative law judge found that claimant was a "miner" within the meaning of the Act, and that employer was the appropriate responsible operator. Based upon the filing date of claimant's application for benefits, *i.e,* February 24, 1978, and his crediting claimant with 14 years of qualifying coal mine employment, the administrative law judge considered the claim under 20 C.F.R. Part 727. Director's Exhibit 1. The administrative law judge found that a single qualifying pulmonary function study was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203 (a) (2), and that the evidence of record was insufficient to establish rebuttal of the presumption pursuant to 20 C.F.R. §727.203 (b) (1)-(b) (4). Accordingly, benefits were awarded. On appeal, employer argues that the administrative law judge erred in finding claimant to be a "miner" within the meaning of the Act and in identifying employer, a common carrier by rail, as the appropriate responsible operator. In the alternative, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the interim presumption under Section 727.203(a)(2) and insufficient to establish rebuttal under Section 727.203 (b) (3) and (b) (4). Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's Decision and Order. An amicus curiae brief was also filed on behalf of the American Railroad Association (the Association), which contends that railroad employees of interstate common carriers as well as the independent railroad companies are not within the scope of the

Act.[6] In the alternative, the Association contends that the administrative law judge erred by not considering at invocation whether claimant's employment occurred in an environment comparable or substantially similar to that of underground miners.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921 (b) (3), as incorporated by 30 U.S.C. §932 (a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address employer's contention that the administrative law judge erred in finding claimant to be a "miner" under the Act, as claimant's duties as a railroad brakeman and conductor fail to satisfy the requisites of qualifying coal mine employment as set forth in *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985).[7] In *Whisman*, a three-prong test was established by

---

[6] The Board in its Order dated February 5, 1988 granted the Petition to Intervene on Behalf of the Association of American Railroads and granted the Petition to Intervene on Behalf of the Association of American Railroads and granted the Association's request to participate in this case by filing a brief as "Amicus Curiae." However, as the amicus brief raises virtually all of the same arguments posed by employer, only the unique arguments made on behalf of the Association will be separately addressed.

[7] At issue is the period of claimant's employment with employer which occurred between 1956-1973 when claimant transported raw coal from Carbo Hollows to a Clinchfield Coal preparation facility (hereinafter referred to as the "Carbo Run"). Claimant's duties on the Carbo Run were those of a brakeman and conductor, which the majority of his time spent as a brakeman. Specifically, claimant reported that his work on the Carbo Run consisted primarily of delivering empty coal cars to the mine site (tipple) at Jewell Ridge Coal Co., where the cars were loaded with raw coal by employees of the mine operator which he then delivered to the Clinchfield Preparation Plant, which was located approximately seven to eight miles away from the mine site, where the coal was washed, graded (processed) and classified as to its destination. Moreover, claimant's testimony indicates that his duties entailed delivering the railroad cars at the tipple for loading; coupling and uncoupling the cars; coupling and setting brakes; obtaining tags for the cars; preparing the various paperwork; and, then delivering the raw coal to the "raw coalyard" of the preparation plant at which point other crews would subsequently deliver the processed coal to its destination. *See* Hearing Transcript at 22-26, 30, 48, 50; Director's Exhibit 5.

which to define a miner under the Act and regulations. In order to be a miner under the Act it must be established that, (1) the coal with which the miner worked was still in the course of being processed, and not yet a finished product in the stream of commerce (Status of the coal test); (2) the miner performed a function integral to the extraction of preparation of coal, and not one merely ancillary to the delivery and commercial use of processed coal (function test); and (3) the miner's work occurred in or around a coal mine or coal preparation facility (situs test). *See Whisman, supra; see also Slone v. Director, OWCP,* 12 BLR 1-92 (1988). We note that the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this claim lies, has, in defining a miner under the Act, applied a two-prong "function-situs" test which incorporates the status of the coal test and the function inquiry. *See Collins v. Director, OWCP,* 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *Eplion v. Director, OWCP,* 794 F.2d 935, BLR 2-52 (4th Cir. 1986).

Initially, we reject the contention by the amicus curiae suggesting that the test for defining covered coal mine employment also incorporates a requirement that the responsible operator have an economic interest in the coal being mined. Amicus Brief at 10. There is no such requirement in the Act or regulations. *See generally* 20 C.F.R. §§725.492, 725.493.

Employer asserts that with respect to the status of the coal inquiry, the administrative law judge employed an erroneous legal standard by focusing on the condition of the coal itself rather than on its position in commerce. Employer contends that the "status" requirement was not satisfied in the instant case since claimant failed to affirmatively establish that the raw coal being transported had not already been purchased and thus placed in the stream of commerce prior to arriving at the preparation plant. We disagree. The record reflects that claimant hauled raw coal to a preparation facility where the coal was washed, graded, and processed ito its marketable form. *See* Hearing Transcript at 23; Directror's Exhibit 5; *Collins, supra.* The administrative law judge, therefore, reasonably found that claimant, in transporting raw coal which was not yet a finished product in a marketable state, fulfilled the "status" requirement. *See Eplion, supra; Roberts v. Weinberger,* 527 F.2d 600

(4th Cir. 1975); *Shaw v. Director, OWCP,* 7 BLR 1-652 (1985); *Tackett v. Director, OWCP,* 6 BLR 1-1081 (1984). In addition, we reject employer's argument that the coal had entered the stream of commerce by virtue of its being a consigned shipment as the record is devoid of any evidence which would substantiate this assertion.

With respect to the "function" requirement, employer contends that claimant's duties were integral only to the transportation process and not to the coal extraction or preparation since claimant was continuously employed by a railroad company, not by a coal mine operator or company. Employer suggests that the fact that claimant hauled raw coal in this case was only incidental to his transportation-related duties. The administrative law judge, as finder of fact, acted within his discretion in determining that claimant's transportation of raw coal from the mine to the preparation plant was integral to the coal production process. *See generally Stroh v. Director, OWCP,* 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987); *Seltzer v. Director, OWCP,* 7 BLR 1-912 (1985); *see also Whisman, supra.* Moreover, we reject the argument that the nature of an employer's business is determinative on the issue of whether claimant is a miner under the Act. *See generally Freeman v. Director, OWCP,* 600 F.2d 1057 (5th Cir. 1979); *Roberts, supra; Clifford v. Director, OWCP,* 7 BLR 1-817 (1985). We, therefore, affirm the administrative law judge's finding that claimant's transportation of coal was integral to the coal production process.

Employer further argues that claimant did not satisfy the "situs" prong since claimant's employment primarily involved transporting coal *away* from the mine site. Moreover, employer maintains that claimant failed to carry his burden of proof in establishing that the time he spent at the mine site was significant so as to fulfill the "situs" requirement. The administrative law judge properly found that claimant worked "in or around a mine" since the boundaries of a mine extend at least to the point where the coal is processed and loaded for further shipment. *See* 20 C.F.R. §725.101 (a) (23); *Roberts, supra.* The administrative law judge further acted within his discretion in finding, based upon claimant's uncontradicted testimony, that claimant had established that a significant portion of his work day occurred at the

mine site. *see* Hearing Transcript at 28-29, 38-40, 59-61, 62; *Clifford, supra.* The administrative law judge's finding that claimant has satisfied the situs test is affirmed, and we, therefore also affirm his finding that claimant's work constituted that of a miner as defined by the Act. *See* 30 U.S.C. §902 (d); 20 C.F.R. §725.101 (a) (26).

We next address employer's contention that policy-based considerations require the reversal of the administrative law judge's finding that claimant is a "miner" under the Act. Employer first contends that Congress did not intend to include railroad employees in its definition of a "miner" as there is no provision which expressly includes railroad employees within the scope of the Act's coverage. Employer maintains that the legislative history of the Act demonstrates that the definition of a "miner" was amended only to cover self-employed coal miners who perform coal mine employment typically performed by coal mine operators and that Congress did not intend to extend coverage to the railroad industry. We are not persuaded by employer's contentions. The Act and implementing regulations do not specifically exclude the railroad industry from their coverage, and based on the arguments raised before us, we are not convinced that any such exclusion was intended. Consequently, we decline to hold that railroad employees are excluded from coverage under the Act.[8] We further note that the Board and at least one circuit court of appeals have held that railroad employees may indeed be covered under the Act. *See Louisville and Nashville R. Co. v. Donovan,* 713 F.2d 1243, 1247-1248 (6th Cir. 1983); *Seltzer, supra; Clifford, supra.*

Next, employer contends that railroad employees were not intended to be a protected group under the Act in view of the fact that other federal laws exist for railroad employees which provide a myriad of disability benefits, including benefits for occupational disease such as silicosis, that distinguish

---

[8] Compare the instant Act to the Occupational Safety and Health Act, 29 U.S.C. §653 (1970) which contains a provision excluding certain employees who are covered under the jurisdiction of other federal agencies.

between railroad employment involved in the mining, preparation or supplying of coal and those not so involved.[9] We are again unpersuaded by employer's contention. The mere existence of other federal remedial statutes which pertain specifically to disabled railroad employees is not conclusive with respect to the inquiry of whether such railroad employees may also be considered miners under the Act. Moreover, as the Director notes, the Act does not limit or condition its applicability on the basis of other existing parallel statutes. *See generally Yost v. Schweikerk,* 699 F.2d 438 (8th Cir. 1983).

We also reject the argument raised by the Association suggesting that the interim presumption is not available to railroad employees unless such employees work in an environment comparable or substantially similar to that of underground miners. Again, no such limitation is expressed in the Act or regulations.

We next turn to employer's contention that the administrative law judge erred in identifying it as the appropriate responsible operator in this case. Employer contends that it is not an "operator" as defined by the Act since it does not operate, control, or supervise a coal mine (and has not done so since 1955), and since it is not an independent contractor performing such services at a mine.[10] Employer further asserts that it is not an independent

---

[9] Specifically, employer refers to the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.* (FELA), the Railroad Retirement Act of 1974, 45 U.S.C §231, *et seq.*, and the Railroad Unemployment Insurance Act, 45 U.S.C. §351, *et seq.*

[10] 20 C.F.R. §725.491 provides in pertinent part that an operator may be:

> . . . any owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services . . . at such mine . . . other employers, including those engaged in . . . *transportation,* shall also be considered to be operators for purposes of this part . . . an independent contractor which performs . . . services . . . at a mine or preparation . . . facility may be held liable for the payment of benefits under this part as a coal mine operator with respect to its employes who work . . . in or around a coal mine . . . [in the] *transportation* of coal . . . with such contractor . . . It is Congress' intent that *any employer of a miner as defined in §725.202(a) shall, to the extent appropriate, be considered an operator for the purposes of this part* . . . (Emphasis added).

contractor since its work in transporting coal does not include extracting or preparing coal, *i.e.,* tasks which are usually performed by an operator of a coal mine. Employer also contends, in the alternative, that even if it is deemed to be an operator under the Act, the administrative law judge erred in not finding that its presence at the mine site providing transportation services constituted inadequate and *de minimus* contact.

Contrary to employer's assertions, the administrative law judge acted within his discretion in identifying employer as an operator under the regulations which provide, without excepting independent railroad companies, that ". . . any employer of a miner as defined in §725.202 (a) shall, to the extent appropriate, be considered an operator for purposes of this part and the provisions of this part shall be construed in accordance with this intent." 20 C.F.R. §725.491 (a). Also, the administrative law judge reasonably found that employer maintained a continued presence at the mine as opposed to *de minimus* or sporadic contact, especially in light of the fact that claimant's Carbo Run employment occurred over a span of 17 years. Thus, we affirm the administrative law judge's finding that employer is an "operator" for purposes of the Act on the basis that employer "employed" a "miner" as defined by the Act and maintained a continuing presence at the mine site. *See* 20 C.F.R. §725.491; *Itell v. Ritchey Trucking Company,* 8 BLR 1-356 (1985).[11]

Employer also maintains that common carriers by rail are not appropriate responsible operators under the Act. Employer asserts that common carriers by rail are not covered under the Act as they are not specifically included in the Act, thereby evidencing Congress' intent not to extend coverage to independent railroad companies. Employer also avers that since only the coal mining industry contributes to the Black Lung Disability Trust Fund, Congress therefore intended to place the burden of payment solely on the coal mining industry. Again, we are not persuaded by employer's arguments. The Act's implementing

---

[11] Employer also contends that if it is deemed to employ a miner engaged in coal mine employment, then it will simultaneously be in *per se* violation of federal laws which prohibit railroad companies from transporting commodities in which they have a part in the production. This argument, however, is not determinative on the issue of whether the Act or its implementing regulations intended to exclude such workers.

regulations do not exclude independent railroad companies from their coverage. *See* 20 C.F.R. §725.491. It is the Board's position, therefore, that had Congress intended to provide an exception for independent railroad companies, it would have done so.

Finally, we address employer's contentions pertaining to the administrative law judge's findings at Part 727. Employer challenges the administrative law judge's finding that the evidence was sufficient to establish invocation of the interim presumption pursuant to Section 727.203 (a) (2) on the basis of a single qualifying pulmonary function study and insufficient to establish rebuttal pursuant to Section 727.203 (b) (3) and (b) (4).[12]

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Supreme Court held that all like-kind evidence must be weighed prior to invocation and that invocation must be established by a preponderance of the evidence. *Mullins Coal Co., Inc. of Virginia v. Director, OWCP,* 108 S.Ct. 427, 11 BLR 2-1 (1987), *reh'g denied,* 108 S.Ct. 787 (1988). Although the administrative law judge based his finding of invocation on a single qualifying pulmonary function study, it is noted that all of the conforming pulmonary function study evidence of record yielded qualifying values under Section 727.203 (a) (2). *See* 20 C.F.R. §§410.430, 727.203 (a) (2); *see also Anderson v. The Youghiogheny and Ohio Coal Co.,* 7 BLR 1-152 (1984). We therefore hold that invocation at Section 727.203 (a) (2) is established as a matter of law.[13]

Turning to rebuttal, employer first contends that the administrative law judge erred in discrediting the medical opinions of Drs. Buddington and Byers simply because their opinions were primarily based on negative x-ray evidence. An administrative law judge may not discredit medical reports on the basis that they were based, in part, on negative x-ray evidence

---

[12] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate value set forth in the table at Section 727.203 (a) (2).

[13] The administrative law judge's findings that the evidence failed to establish rebuttal at Section 727.203 (b) (1) and (b) (2) are affirmed as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

when the record contains subsequent positive x-ray evidence. *See generally Casey v. Director, OWCP,* 7 BLR 1-873 (1985). The administrative law judge, however, acted within his discretion in giving the medical opinions of Drs. Buddington and Byers less weight on the basis that the later x-ray evidence suggested that claimant's condition had subsequently changed, thereby rendering those opinions less probative.[14] *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989). Employer also maintains that the medical opinion of Dr. Smiddy is not a reasoned opinion since the physician failed to provide an adequate rationale for his conclusions and failed to address the issue of etiology. The administrative law judge rationally credited the medical opinion of Dr. Smiddy over the other medical opinions of record since Dr. Smiddy's opinion was the most recent opinion of record based on the most recent objective evidence. *See Bates v. Director, OWCP,* 7 BLR 1-13 (1984). We therefore affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish rebuttal at Section 727.203 (b) (3).[15]

Employer's other contentions, *i.e.,* that the administrative law judge rejected without explanation the x-ray reading of Dr. Kress and improperly weighed the x-ray evidence at Section 727.203 (b)(4), are likewise without merit. The administrative law judge considered all of the x-ray evidence of record in conjunction with the medical opinion evidence at Section 727.203 (b)(4) and rationally found the x-rays of August 24, 1984 and July 2, 1985 to be the most probative radiographic evidence of record based on their recency. *See Clark, supra.* In finding the August 1984

---

[14] It is noted that the medical opinion of Dr. Buddington is insufficient to establish rebuttal at Section 727.203 (b)(3) since it fails to address the cause of claimant's impairment and does not rule out the causal relationship between the miner's disability and his coal mine employment. *See Phillips v. Jewell Ridge Coal Co.,* 825 F.2d 408 (table), 10 BLR 2-160 (4th Cir. 1987); *Bethlehem Mines Corp. v. Massey,* 737 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

[15] Contrary to employer's contention, Dr. Smiddy did address the cause of claimant's respiratory disability. The physician opined that claimant has a severe respiratory impairment with total disability related to a combination of severe chronic obstructive pulmonary disease and an element of significant coal dust exposure. *See* Claimant's Exhibit 8. Moreover, it is not claimant's burden on rebuttal to establish the degree to which claimant's coal dust exposure contributed to his respiratory disability. *See Lattimer v. Peabody Coal Co.,* 8 BLR 1-509 (1986).

x-ray to be positive for pneumoconiosis, the administrative law judge reasonably gave greater weight to the positive interpretations of that x-ray based on the numerical superiority of the positive readings by physicians with superior qualifications. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *see also Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In subsequently weighing the positive readings of the August 1984 x-ray with Dr. Westerfield's negative readings of the July 1985 x-ray, the administrative law judge acted within his discretion in giving greater weight to the positive readings on the basis that they were read by physicians with qualifications superior to those of Dr. Westerfield. *See Roberts, supra.* In addition, employer argues that the administrative law judge erred in applying the "true doubt" rule on rebuttal at Section 727.203 (b)(4). Although the administrative law judge applied the "true doubt" rule in weighing the readings pertaining to the August 1984 x-ray, no prejudice resulted to employer as the administrative law judge, in finding that employer failed to establish rebuttal of the interim presumption by a preponderance of the evidence, applied the correct burden of proof. *See Meade v. The Pittston Co.*, 6 BLR 1-224 (1983). Thus, substantial evidence supports the administrative law judge's finding that the medical and x-ray opinion evidence failed to establish rebuttal at Section 727.203 (b)(4), and that finding is therefore affirmed. Finally, employer asserts that the administrative law judge erred in failing to explain his rejection of the x-ray report of Dr. Kress which was submitted at the hearing. Contrary to employer's contention, the record reflects that employer voluntarily withdrew Dr. Kress' x-ray reading and accompanying qualifications during the hearing and did not subsequently submit that evidence into the record. *See* Hearing Transcript at 15-16; Employer's letter dated September 10, 1986.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

/s/ ROY P. SMITH

ROY P. SMITH, Acting Chief
Administrative Appeals Judge

/s/ JAMES F. BROWN

JAMES F. BROWN
Administrative Appeals Judge

/s/ NANCY S. DOLDER

NANCY S. DOLDER
Administrative Appeals Judge

Dated this 29th
day of September 1989

Supreme Court, U.S.
FILED
MAR 19 1991
OFFICE OF THE CLERK

(2)

Case No.: 90-1271

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner

V.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

RESPONDENT ROBERSON'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Robert Austin Vinyard, Esq.
Lawrence L. Moise, III, Esq.
VINYARD & MOISE
Attorneys at Law, P.C.
116 East Valley Street
P. O. Box 1127
Abingdon, VA 24210

Counsel for Olen Roberson

BEST AVAILABLE COPY

QUESTION PRESENTED

Did Congress intend that a railroad worker, engaged in the transportation of coal in or around a coal mine can qualify as a "miner" within the meaning of Section 402(d) of the Black Lung Benefits Act, as amended, 30 U.S.C. 902(d)(1988), and thereby qualify for benefits under the Act?

LIST OF PARTIES

The names of the parties to the proceeding are contained in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENT	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISIDCTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
I. The Court Of Appeal's Ruling that Congress Intended To Include Railroad Workers Within The Scope Of The Black Lung Benefits Review Act Is Supported By The Plain Language Of The Act And Consistent With The Act's Purpose	5
II. The Federal Courts Have Not Issued Conflicting Interpretations Of The Coverage Of Railroad Workers Under The Black Lung Benefts Act	10
CONCLUSION	10
APPENDIX	
Opinion of the Court of Appeals in *Norfolk & Western Railway Company v. Olen Roberson and Director, Office of*	

Workers' Compensation Programs, United States Department of Labor, 918 F.2d 1144 (4th Cir. 1990) 1a

TABLE OF AUTHORITIES

Cases

	Page
Chevron, U.S.A., Inc. v. Natural Resource Defense Council, 467 U.S. 837 1984	5,7,9
Louisville and N.R.R. v. Donovan, No. 89-6111-L(g)(W.D. Ky. 1981) rev'd on other grounds, 713 F.2d 1243 (6th Cir.1983) cert. denied 466 U.S. 936 (1984)	5,10
Louisville and N.R.R. v. Donovan, 713 F.2d 1243 (6th Cir.1983) cert. denied 466 U.S. 936 (1984)	10
Roberts v. Weinberger, 527 F.2d 600 (4th Cir. 1975)	9
Young v. Clinchfield Railroad Company, 288 F.2d 499 (4th Cir. 1961)	6

Statutes & Rules

Black Lung Benefits Act, as amended 30 U.S.C. Section 901, et seq Section 402(d), 30 U.S.C. Section 902(d) 1988	passim
Black Lung Benefits Reform Act of 1977 Pub. L. No. 95-239 92 Stat. 95	2
Section 2(b), 92 Stat. 95	2
20 C.F.R. Section 725.101	8
Federal Employer's Liability Act 45 U.S.C. Sections 51-60 (1988)	4

45 U.S.C. Section 58 7

Railroad Retirement Act, 45 U.S.C. Section 231-31u (1988) 4,6

Railroad Unemployment Insurance Act 45 U.S.C. Section 351, et seq. 4

28 U.S.C. Section 1254 (1) (1988) 1

Other Authorities

H. Conf. Reb. No. 864 95th Cong. 2d. Sess. *reprinted* in 2 U.S. Code Cong. & Admin. News 308-09 (1978) 9

S. Rep. No. 95-209, 95th Cong. 1st Sess. 21 (1977) 9

Case No.: 90-1271

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner

V.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

RESPONDENT ROBERSON'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 918 F.2d 1144 and is reprinted in the Appendix to the Brief ("App.") at 1a.

The September 29, 1989 decision of the United States Department of Labor Benefits Review Board, the administrative decision reviewed by the Court of Appeals, reported at 13 BLR (Black Lung Reporter) 1-6.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on November 16, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)(1988). The Petition for Writ of Certiorari was filed with this Court on February 11, 1991

in compliance with the time period provided by Supreme Court Rule 13.1.

STATUTES INVOKED

Black Lung Benefits Act ("BLBA"), Section 402(d), 30 U.S.C. Section 902(d)(1988), as amended by Section 2(b) of the Black Lung Benefits Reform Act of 1977 ("1977 Amendments"), Pub. L. No. 95-239, 92 Stat. 95:

> The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

STATEMENT OF THE CASE

I. Material Proceedings Below

This matter arose on February 24, 1978, upon the filing of a claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. Section 901 et seq. by the Claimant, Olen Roberson, (Director's Exhibit, "DX," 1). The Deputy Commissioner initially approved the claim and named Norfolk & Western Railway (hereinafter referred to as Railroad) as the responsible operator potentially liable for the payment of benefits (DX 11, 17, 20). The Deputy Commissioner later determined that Roberson's activities did not fall within the definition of a miner, and denied benefits. Claimant thereafter requested a formal hearing before the Office of Administrative Law Judges. The hearing was held in Abingdon, Virginia, on July 15, 1985 before Administrative Law Judge, Lawrence E. Gray. The Administrative Law Judge issued a Decision and Order awarding benefits on December 30, 1986. The Railroad timely appealed and filed a Petition for Review and supporting brief with the Benefits Review Board. The

Claimant and Director filed responding briefs. The Benefits Review Board issued a Decision and Order on September 29, 1989 affirming the decision of the Administrative Law Judge. The Railroad then appealed the decision to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals issued an Opinion on November 16, 1990 affirming the Decision and Order of the Benefits Review Board. The Railroad filed its Petition for a Writ of Certiorari with this Court on or about February 11, 1991. The Respondent, Roberson, by Counsel, received the Petition for a Writ of Certiorari on February 19, 1991.

II. Statement of Facts

At the time of the hearing, Mr. Roberson was a disabled 68 year old man who had completed the ninth grade. Mr. Roberson worked for the N & W Railroad from October 10, 1947 to October 1, 1979. The Administrative Law Judge (hereinafter referred to as ALJ) found that the 14 years of Mr. Roberson's work for the railroad between 1956 and 1973 qualified as the work of a miner (coal transportation worker). The ALJ further concluded that Mr. Roberson had been exposed to coal dust during the period of time he was employed as a coal transportation worker. There is absolutely no doubt that Mr. Roberson suffers from a totally disabling respiratory impairment. The Railroad has abandoned its arguments in regard to Mr. Roberson's eligibility for benefits from a medical standpoint.1

III. The Court of Appeals Decision

The Court of Appeals for the Fourth Circuit affirmed the Decision of the Benefits Review Board in its entirety. The Court of Appeals ruled that the plain language of BLBA Section 402(d) included railroad workers, such as Mr. Roberson, who were exposed to coal dust while involved in the transportation of coal in or

---

1 The Employer does not raise any eligibility issues involving medical questions in the Petition for a Writ of Certiorari.

around a coal mine. App. pg. 5a. The Court of Appeals noted in a footnote that even if the language of the BLBA had been unclear and a resort to the legislative history had been undertaken, the Court's decision would have remained the same. App. pg 7a. The Court of Appeals concluded its opinion by noting that its holding was narrow in scope, applying only in cases of railroad workers exposed to coal dust who were engaged in the transportation of coal or in or around a coal mine who met the tests of function and situs. App. pg. 11a.

SUMMARY OF THE ARGUMENT REASONS FOR NOT GRANTING THE WRIT

The Railroad advances three major arguments in support of the Petition for a Writ of Certiorari. First, the Railroad argues that since railroad workers already fall within a comprehensive scheme of federal legislation (Federal Employer's Liability Act, 45 U.S.C. Sections 51-60 (1988); the Railroad Retirement Act, 45 U.S.C. Section 231-31u (1988)), the Railroad Unemployment Insurance Act 45 U.S.C. Section 351, et seq. that Congress did not intend to extend the coverage of the BLBA to railroad workers. However, the BLBA is materially different from the Federal Employers liability Act, Railroad Retirement Act and the Railroad Unemployment Insurance Act. Additionally, none of these statutes indicate a Congressional intent to preclude other federal remedial legislation from applying to railroad workers.

Secondly, the Railroad contends that the legislative history in regard to Section 402(d) of BLBA reveals a Congressional intent to exclude railroad workers from the Act's coverage. However, just the contrary is true. The plain language of Section 402(d) reveals that Congress included coal trans-portation workers who worked "in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment."

Finally, the Railroad argues that the Court of Appeal's decision in this case conflicts the United States District Court decision in *Louisville & N.R.R. v. Donovan*,

No. 89-6111-L(G)(W.D. Ky. 1981), rev'd on other grounds, 713 F.2d 1243 (6th Cir. 1983), cert. denied, 466 U.S. 936(1984) (hereinafter referred to as Louisville & N.R.R.). Additionally, the Court of Appeals for the Sixth Circuit reversed the District Court in Louisville & N.R.R. The District Court's reasoning in Louisville & N.R.R. is not in accord with this Court opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Furthermore, the legislative history upon which the District Court in Louisville & N.R.R. relied, was the Senate Report No. 209 95th Cong., 1st Sess. 21(1977). As the Court of Appeals pointed out the "Senate Bill did not prevail and the subsequent Conference Committee Report contains no language excluding railroad workers or any other specific set of transportation workers from the definition of miner; . . .". App. pg 7a.

ARGUMENT

I. The Court of Appeal's Ruling That Congress Intended To Include Railroad Workers Within The Scope Of The Black Lung Benefits Act Is Supported By The Plain Language Of The Act And Is Consistent With the Act's Purpose.

First, the Railroad states that there are other Federal programs specifically designated for railroad employees that provide adequate exclusive remedies for railroad employees. One of the Acts the Railroad lists is the Federal Employer's Liability Act, 45 U.S.C. Section 51 et seq. (hereinafter referred to as "FELA"). The FELA essentially is a Federal worker's compensation system for railroad employees. It takes the place of state worker's compensation remedies. The Railroad goes on to argue that FELA is an exclusive remedy and therefore it would be inconsistent to allow railroad employees to make claims under the Federal Black Lung Benefits Act. Yet, the flaw in this argument is clear. A worker that works in an underground coal mine has the protection of state worker's compensation laws just as the railroad employee has the

protection of the FELA. Just as it was necessary for Congress to step in and provide an additional worker's compensation program to underground and surface coal miners for Black Lung (in essence to supplement the state worker's compensation programs until those programs came up to Federal standards in providing protection for occupationally acquired coal worker's pneumoconiosis), Congress stepped in and provided the same additional protection for railroad employees who fall within the working parameters of the coal mining industry.

The Railroad cites case law supporting the argument that occupational disease claims may be made under FELA. However, such claims can only succeed upon a basis of some common law theory of liability, such as negligence. See *Young v. Clinchfield Railroad Company*, 288 F.2d 499 (4th Circuit, 1961). The Railroad also argues that if railroad workers can receive Federal Black Lung benefits, then they would be able to draw both Federal Black Lung and FELA benefits for the same exposure and injury. The Railroad provides no support for this argument. The offset that applies for miners who receive overlapping state and federal benefits would also apply in the case of railroad employees qualifying for both Federal Black Lung benefits and FELA benefits.

The Railroad also discusses the Railroad Retirement Act of 1974, 45 U.S.C. Section 231, et seq. The Railroad argues that to permit a retired railroad worker to collect benefits under the Railroad Retirement Act and the Federal Black Lung Benefits Act allows for double compensation. However, Railroad Retirement Act benefits are received by railroad workers in lieu of Social Security benefits. Certainly, the Railroad must know that many disabled coal miners receive Federal Black Lung benefits along with their Social Security benefits. The Railroad's argument of double compensation has no merit.

Mr. Roberson would agree that Congress has put in place a comprehensive federal statutory scheme providing benefits to railroad employees. However, contrary to the Railroad's contention, Mr. Roberson argues that it is

reasonable to conclude that Congress also intended to provide additional protection to railroad employees exposed to coal dust while engaging in the working parameters of the coal mining industry. Thus, the Federal Black Lung Benefits Act is part of the comprehensive federal statutory scheme that Congress has provided for railroad employees. As the Court of Appeals noted in its opinion, the other federal legislation mentioned by the Railroad does not indicate a Congressional intent to preclude railroad workers from the BLBA. App. pg. 8a. In fact, the FELA specifically states at 45 U.S.C. Section 58:

> Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

The second argument advanced by the Railroad revolves around the legislative history of the BLBA, particularly the 1977 Amendments incorporated into the Black Lung Benefits Reform Act of 1977. However, there must be a finding that the statutory language being scrutinized is unclear or ambiguous as to what Congress intended before resorting to an analysis of the legislative history. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (hereinafter referred to as Chevron). The statutory language in question is found in BLBA Section 402(d) which defines the term "miner" as follows:

> Any individual who works or has worked in or around a coal mine or a coal preparation facility in the extraction or prep-aration of coal. Such term also includes an individual who works or has worked in coal mine construction or trans-portation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment. (emphasis added).

The Court of Appeals concluded that the plain language of Section 402(d) included "transportation

workers who were involved in the extraction or preparation of coal, who worked in or around a coal mine and who where exposed to coal dust as a result of such employment." App. pg 5a. The Court of Appeals noted that it was not disputed that Mr. Roberson was exposed to coal dust. The Court of Appeals then addressed the two other requirements in Section 402(d): (1) Situs test (work in or around a coal mine); and (2) function test (work integral to the extraction or preparation of coal). App. pg. 5a.

If one accepts the Railroad's argument that all railroad workers are not included in the term "miner", then one would have to conclude that all coal truck drivers are also not included, which is clearly not the case. Furthermore, one cannot consider the issue of miner without considering also the issue of what is defined as a "mine" since the "miner" definition hinges on a complete and full understanding of the definition of "mine". A coal mine is defined at 20 C.F.R. Section 725.101 the regulations (23):

> "Coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon or under or above the surfaces of such land, by any person used in or to be used in or resulting from the work of extracting in such areas of bituminous coal lignite, or anthracite, from its natural deposits in the earth by any means or method and in the work of preparing the coal so extracted and includes custom coal preparation facilities.

There is no doubt that a tipple located at a mine site is included within the definition of mine. There is also no doubt that a preparation facility is considered within the definition of "coal mine". A rail transportation system that connects the tipple and the preparation facility is a

transportation facility falling within the definition of a "coal mine".

The Court of Appeals in concluding that Mr. Roberson satisfied both the situs and function tests noted that Mr. Roberson's work on the railroad was almost exactly the same as the work performed by the truck driver in *Roberts v. Weinberger*, 527 F.2d 600(4th Cir. 1975), hereinafter referred to as *Roberts*. App. pg. 6a. In both the *Roberts* case and this case, a trans-portation worker hauled raw coal from a coal mine site to a preparation facility and was exposed to coal dust as a result of such work. The only difference between the two cases, is that the claimant in Roberts hauled the raw coal by truck as opposed to the use of a train in this case.

Although the Court of Appeals ruled that the language of Section 402(d) was clear and unambiguous as to the Congressional intent, thereby negating a need to resort to the legislature history of the Act, the Court went on to conclude that even if the legislative history is considered the same result is reached. App. pg. 7a. The Court of Appeals found the Railroad's reliance on Senate Report No. 209, 95th Cong., 1st Sess. 21 (1977) to be misplaced. The Senate bill did not prevail and the Conference Report, (H. Conf. Rep. No. 864, 95th Cong. 2d Sess., reprinted in 2 U.S. Code Cong. & Admin. News 308-09 (1978)) "contained no language excluding railroad workers or any other specific set of transportation workers from the definition of miner ..." App. pg. 7a. The Court of Appeals thus concluded that the Director's interpretation of the Act still would be a permissible one and one that must be given effect pursuant to a *Chevron* analysis. App. pg. 7a.

The legislative history is far more confusing than the plain language of the statute. If Congress did not wish to include railroad workers within the definition of miner it could easily have done so. The Court of Appeals' analysis is rational and is in accordance with the law. Thus, the Court should deny the Railroad's Petition for a Writ of Certiorari.

II. The Federal Courts Have Not Issued Conflicti Interpretations Of The Coverage Of Railroa Workers Under The BLBA.

The Railroad has urged the Court to grant i Petition for a Writ of Certiorari on the ground that the are conflicting federal court decisions on whether railroa workers are covered under the Black Lung Benefits Ac However, the Court of Appeals decision in this case is th only current federal court decision on the issue whic stands. The only other federal court to address the issu was the Federal District Court for the Western District Kentucky in the case of *Louisville & N.R.R. v. Donovan*, N 80-0611-L(G)(W.D. Ky. 1981). However, the Court Appeals for the Sixth Circuit reversed the District Cou decision for lack of subject matter jurisdiction. *Louisville N.R.R. v. Donovan*, 713 F.2d 1243 (6th Cir. 1983) ce denied, 466 U.S. 936 (1984). The Court of Appeals for th Sixth Circuit in reversing the District Court in *Louisville N.R.R.* specifically questioned the District Court interpretation of the legislative history of the 197 amendments *Louisville & N.R.R., supra*. 713 F.2d at 124 49. However, the Court of Appeals for the Sixth Circu concluded that this issue was not properly before the Cou and thus could not be resolved by the Court. *Louisville N.R.R., supra*. 713 F.2d at 1248, 1249. There is no confli among or between the circuits on the issue in questio Thus, the Court should deny the Railroad's Petition for Writ of Certiorari.

CONCLUSION

The Court of Appeals found the plain language Section 402(d) of the BLBA clearly revealed Congressional intent to bring a small group of railroa workers within the scope of the BLBA. Even if th legislative history is used for guidance, the Director interpretation of Section 402(d), which includes coverage railroad workers transporting raw coal from a coal mine sit to a preparation facility, is a permissible construction of th Act which must be given effect under a Chevron analysi Notwithstanding the Railroad's contention to the contra

there exists no conflict among or between the Circuits on the issue involved in the case at bar. Furthermore, the decision by the Court of Appeals is a narrow holding and will impact on only a small group of railroad workers. Clearly, there are many railroad workers who have transported coal after the extraction and preparation processes have been completed and are exposed to a substantial amount of coal dust. Whether rightly or wrongly, these workers have been excluded from the protection of the Black Lung Benefits Act. Yet, there is a subclass of railroad workers who performed a substantial portion of their employment for the railroad transporting coal from a mine site directly to a preparation facility. Mr. Roberson falls within that subclass of railroad workers.

WHEREFORE, for the reasons expressed herein, the Respondent, Olen Roberson, by Counsel prays that the Honorable Supreme Court of the United States deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Robert Austin Vinyard, Esq.
Lawrence L. Moise, III, Esq.
VINYARD & MOISE, P.C.
116 East Valley Street
P. O. Box 1127
Abingdon, VA 24210

Counsel for Respondent
Olen Roberson

Date: March 11, 1991

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the Court of Appeals in *Norfolk & Western Railway Company v. Olen Roberson and Director, Office of Workers' Compensation Programs, United States Department of Labor*, 918 F.2d 114 (4th Cir. 1990) 1a

---

Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge Phillips joined.

ARGUED: William Beverly Poff, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Petitioner. Elizabeth Hopkins, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Lawrence Lee Moise, III, VINYARD AND MOISE, P.C., Abingdon, Virginia, for Respondents. ON BRIEF: Clinton S. Morse, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia; Douglas A. Smoot, JACKSON & KELLY, Charleston, West Virginia, for Petitioner. Robert P. Davis, Solicitor of Labor, Allen H. Feldman, Associate Solicitor for Special Appellate and Supreme Court Litigation, Steven J. Mandel, Counsel for Appellate Litigation, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Robert Austin Vinyard, VINYARD AND MOISE, P.C., Abingdon, Virginia, for Respondents. J. Thomas Tidd, Daniel Saphire, ASSOCIATE OF AMERICAN RAILROADS, Washington, D.C.; Ralph J. Moore, Jr., John Townsend Rich, Alok Ahuja, SHEA & GARDNER, Washington, D.C., for Amicus Curiae.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2192

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

versus

OLEN R. ROBERSON; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

ASSOCIATION OF AMERICAN RAILROADS,

Amicus Curiae.

On Petition for Review of an Order of the Benefits Review Board. (87-235-BLA)

Argued: April 4, 1990
Decided: November 16, 1990

Before WIDENER, PHILLIPS, and WILKINSON*, Circuit Judges

---

* Judge Wilkinson was a member of the panel which heard oral argument in the case, but he later recused himself. The decision is filed by a quorum of the panel 28 U.S.C. 46(d).

Widener, Circuit Judge:

Norfolk & Western Railway Company (N & W) petitions for review of a decision and order of the Benefits Review Board affirming an order of an Administrative Law Judge (ALJ) that awarded benefits under the Black Lung Benefits Act, 30 U.S.C. Sections 901, et seq. (Act), to Olen R. Roberson, a retired N & W employee. Both the ALJ and the Board concluded that N & W qualified as a coal mine operator under the Act and that Roberson qualified as a coal miner who was entitled to benefits. We affirm.

Olen R. Roberson worked as a brakeman and conductor for N & W from 1947 to 1979. The parties do not dispute that the initial and final periods of his employment, from 1947 to 1956 and from 1973 to his retirement in 1979, did not constitute coal mine employment. Between 1956 and 1973, however, Roberson worked on N & W runs that delivered empty railroad cars to mine sites to be loaded with raw coal and which then hauled the raw coal from the mines to a coal preparation plant where the coal was washed, cleaned, graded and reloaded for further shipment.

One of the principal crews with which Roberson worked made the "Carbo Run," which originated in Carbo, Virginia.1 This crew traveled from Carbo thirty miles to Richlands, Virginia, where it picked up empty coal cars and delivered them to a Jewel Ridge Coal Company mine located some six miles away. The crew then transported the raw coal back to Carbo to the Clinchfield Coal Company preparation plant, a distance of thirty-six miles. The entire run took twelve to fourteen hours to complete. Roberson's crew also transported raw coal to the Clinchfield preparation plant from mines in Duty, Virginia, an eight to ten mile run that could be accomplished two or three times in one day.

---

1 The ALJ credited Roberson with 14 years of coal mine employment based on his testimony that he worked on the Carbo Run a total of 14 years.

judicial deference, if the Director urges us to adopt the Board's interpretation, our analysis is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Newport News Shipbuilding and Dry Dock Co. v. Howard*, 904 F.2d. 206, 208 (4th Cir. 1990).

Under *Chevron* we first must ask whether Congress directly has addressed the precise issue in dispute. *Chevron*, 467 U.S. at 842. If so, the court and the agency must give effect to unambiguous Congressional intent. *Chevron*, 467 U.S. at 842-43. If Congressional intent is unclear or ambiguous, however, we must determine only whether the Director's interpretation is based on a permissible construction of the Act; we may not substitute our own construction of the Act for a reasonable one made by the Director. *Chevron*, 467 U.S. at 844; *Howard*, 904 F.2d at 209.

Our starting point, of course, is the language of the Act, which defines a miner as

> any individual who works or has worked in or around a coal mine or a coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

30 U.S.C. Section 902(d) (emphasis added). Thus, the plain language of the statute requires the inclusion in the definition of miner of transportation workers who were involved "in the extraction or preparation of coal," who worked "in or around a coal mine," and who were "exposed to coal dust as a result of such employment." Because N & W does not dispute Roberson's exposure to coal dust, we turn to the other two inquiries, which often are described as the requirements of situs and function. *Eplion*, 794 F.2d at 937.

Roberson's duties included coupling and uncoupling high pressure air hoses between the cars, which blew coal dust into the air, setting and releasing brakes, and obtaining loading numbers and tags from the individual cars. Because most of Roberson's tasks were performed while the train was stationary, Roberson spent a significant portion of his workday at the mine sites and the preparation plant. At times, Roberson "walked" a hundred cars at a time. In addition, coal dust also blew off the tops of the loaded railroad cars during the trips between the mines and the preparation plant. Thus, although Roberson never participated in the actual loading or unloading of coal, he was continually exposed to large amounts of coal dust. Roberson applied for black lung benefits in 1978, one year before his retirement.

The ALJ determined that N & W's coal hauling activities qualified it as the responsible operator under the Act and that Roberson qualified as a miner who was entitled to benefits. Finally, the ALJ concluded pursuant to the interim presumption in 20 C.F.R. Section 727.203(a) that Roberson is totally disabled from pneumoconiosis due to coal mine employment, and that N & W failed to rebut the presumption.2 The Board found that each of the ALJ's conclusions was supported by substantial evidence. See 33 U.S.C. Section 921(b)(3).

Our review of the Board's order is governed by section 21 of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. Section 921. 30 U.S.C. Section 932(a). Specifically, we must uphold the Board's resolution of questions of statutory construction or application of the Act to a specific set of facts if it is supported by a reasonable factual and legal basis. *Eplion v. Director, OWCP*, 794 F.2d 935, 936 (4th Cir. 1986). In addition, the Director urges us to adopt the Board's interpretation of the Act. Although the Board's interpretation standing alone is not entitled to special

---

2 N & W does not challenge on review the findings of the ALJ and Board on this issue, so the Board's finding of disability stands as ordered.

In affirming an order of the Board denying black lung benefits to a claimant whose job entailed knocking open doors to railroad cars so that coal could be loaded into barges, we emphasized that "[claimant] was not involved in transporting the coal before it was prepared. The coal was already processed and prepared for market before [claimant] had any contact with it." Eplion, 794 F.2d at 937. We concluded in Eplion, therefore, that the claimant failed to qualify as a miner under the Act because he did not meet the situs and function tests set forth in the statute.

In contrast to *Eplion*, the ALJ's undisputed findings of fact in this case are that Roberson was involved in hauling raw coal from extraction sites (mines) to the preparation plant, which also is considered a coal mine under the Act. See 30 U.S.C. Section 802(h)(2). Transporting raw coal to a preparation plant plainly is part of the preparation of coal, and Roberson therefore satisfies the function test. In addition, the ALJ specifically found that because Roberson did a lot of his work while the train was parked at the mine sites and the preparation plant, Roberson spent "a significant portion of time" in or around a coal mine, as defined by the statute. Therefore, Roberson also satisfies the situs test.

Except for the mode of transportation involved, and perhaps the distance traveled, this case is indistinguishable from *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975). In *Roberts* we determined, three years before the 1978 amendment to the statute expressly included transportation workers in the definition of miner, that a truck driver who hauled coal between a strip mine and the tipple qualified as a miner entitled to benefits under the Act. Just as Roberson did in the case at hand, the truck driver in *Roberts* hauled coal from the extraction site to the tipple, where it was processed, graded, and reloaded for further shipment. *Roberts*, 527 F.2d at 601. We reasoned that the driver's functions

> were part of the process of "extracting the coal and preparing the coal so extracted." The coal was not extracted and prepared

> until it was taken from the mine to the place where it was processed and graded so as to be in condition for delivery to distributors and consumers.

Roberts, 527 F. 2d at 602. Because we concluded in *Roberts* that the Act "is unambiguous in extending coverage" to the truck driver, *Roberts*, 527 F.2d at 602, we have little difficulty in concluding that the plain language of the Act, especially when reinforced by the 1978 amendment, manifests a clear Congressional intent to include in the definition of miner a small group of transportation workers of which Roberson was a member.

N & W advances several arguments in an attempt to distinguish *Roberts* and establish that railroad employees are fundamentally different from other transportation workers. First, it relies extensively on the legislative history to the 1978 amendments to the Act. Because we conclude that the plain language of the Act supports the Board's decision, however, we "must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843, and we have no need to resort to the Act's legislative history.3

---

3 Even if we found the language of the Act unclear and resorted to the legislative history, our result would be no different. N & W relies on Senate Report No. 209 95th Cong., 1st Sess. 21 (1977), which states concerning the definition of miner that "[t]he provision does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line unless such company also operates a mine." The floor manager of the Senate bill, Senator Randolph, made a similar statement during floor debate. The Senate bill, however, did not prevail, and the subsequent Conference Committee Report contains no language excluding railroad workers or any other specific set of transportation workers from the definition of miner; indeed, the Conference Report sticks closely to the literal language of the statute, as have we. H. Conf. Rep. No. 864, 95th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Admin. News 308-09(1978). Because the Conference Report "represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of congressional intent behind the enactment

Second, N & W argues that allowing a railroad employee to recover under the Act would be inconsistent with other federal legislation that already protects railroad employees from disability or injury, such as the Federal Employers' Liability Act, 45 U.S.C. Section 51 et seq., the Railroad Retirement Act, 45 U.S.C. Sections 231 et seq.4 and the Railroad Unemployment Insurance Act 45 U.S.C. Sections 351. et seq. We dissagree. Not only do the statutes differ in certain material respects (the FELA, for example, requires employer negligence, 45 U.S.C. Section 51, while the Black Lung Act does not), none of the other statutes indicate that Congress intended them to preclude the availability of other federal remedial legislation. Instead, the FELA, upon which N & W principally relies, does just the opposite. See 45 U.S.C. Section 58 ("Nothing in this chapter shall be held to limit tne duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress."). So that argument is, we think, without merit.

---

of a statute." Davis v. Lukhard, 788 F.2d 973, 981 (4th Cir.), cert. denied, 479 U.S. 868 (1986). Thus, even if we looked to the legislative history for guidance, the Director's interpretation of the Act still would be a permissible one that we should not set aside. Chevron, 467 U.S. at 843-44. N & W's reliance on Fox v. Director, OWCP, 889 F.2d 1037 (11th Cir. 1989), which cited the Senate Report in the course of determining that a coke oven worker was not a miner, is unpersuasive. The Fox court did not explain why it resorted to the legislative history of a version of a bill that was not adopted, quite possibly because the passage was not essential to the court's holding. In light of the fact that a coke oven is a consumer of coal, the Fox court understandably found that the coke oven worker was not involved in the preparation of coal under the Act. Fox, 889 F.2d at 1042-43. ("[T]he processing and use of the minerals by subsequent consumers is not a part of that process." 889 F.2d. at 1040)

4 N & W has moved to supplement the appellate record in this case to include a letter indicating that Roberson was granted an annuity pursuant to the Railroad Retirement Act based on occupational disability. Although we grant N & W's motion to supplement the record, the letter does not change our analysis for the reasons indicated in the text.

N & W also contends that, as an industry exclusively regulated by the Interstate Commerce Commission (ICC), railroads are uniquely different from other carriers because all their services are considered to be part of interstate commerce. We know of no part of the Act, the regulations, or any reported case interpreting the Act or regulations, however, that distinguishes a common carrier or transportation worker on the basis of connections with interstate commerce. Indeed, in *Roberts* we found that the truck driver qualified as a miner despite conflicting evidence as to whether he was employed by the coal company or a trucking subcontractor. *Roberts*, 527 F.2d at 602. The Fifth Circuit recognized, in *Freeman v. Califano*, 600 F.2d 1057, 1060 & n.2 (5th Cir. 1979), that *Roberts* implicitly rejected an argument that the nature of the employer could make for differing results ("The Fourth Circuit evidently deemed this question unimportant . . . . "), and went on to hold that "nothing in [the Act] or the regulations indicates that application of the presumption should turn on the nature of the employer's business rather than the nature and location of the work done." Also, we do not think that the result in *Roberts* would have been different had a state line lain between the mine and the tipple, and we reject N & W's argument.

Within N & W's many references to the ICC and the federal regulatory statutes, however, is a simpler and somewhat more persuasive argument. In the midst of its recitation of statutes and regulations, N & W also argues that the interstate commerce aspects of its business, and the fact that the Carbo Run covered thirty-six miles, take Roberson's employment out of the statutory definition of employment "in or around a coal mine" and "in the extraction or preparation of coal." As we noted earlier, however, the ALJ found, and N & W does not dispute, that Roberson spent a significant portion of his workday actually at the mines and preparation plant, and that Roberson was engaged in hauling raw coal between two statutory "mines." Thus, N & W's argument, though undoubtedly valid with respect to many of its employees who haul coal, is without merit as to this particular claimant.

Even if Roberson meets the statutory definition of miner, N & W also asserts that it cannot be an operator under the Act. The relevant statute defines operator as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. Section 802(d) (emphasis added). In addition, the applicable regulations provide that "any employer of a miner as defined in Section 727.202(a) shall, to the extent appropriate, be considered an operator for the purposes of this part . . . ." 20 C.F.R. Section 725.491(a). Because we have concluded that Roberson meets the statutory definition of miner, the regulation defines N & W as an operator if "appropriate."

In *Old Dominion Power Co. v. Donovan*, 772 F.2d 92, 96 (4th Cir. 1985), we concluded that Congress intended to include within the definition of operator only those independent contractors who maintain a continuing presence at a mine. Because Old Dominion's employees normally were present at the mine site only once a month to read the meter, we concluded that Old Dominion was not an operator under the statute. By contrast, the ALJ found here that N & W maintained a continuing presence at the mine site and performed services essential to the preparation of the coal. We conclude that N & W appropriately was considered the responsible operator under the Act.5

---

5 N & W argues that classifying it as an operator would place the railroad in violation of federal law because railroads are prohibited from transporting commodities that are "manufactured, mined, or produced by the carrier or under its authority." 49 U.S.C. Section 10746. However, neither Roberson nor the Director ever has asserted that N & W actually mined or supervised the mining of coal, and considering N & W an operator under the plain language of the Act does not alter what the parties do not dispute. The fact that an employer may be a statutory operator under 30 U.S.C. Section 802(d) and 20 C.F.R Section 725.491(a) does not mean that the coal involved was "manufactured, mined or produced" by the employer within the meaning of 49 U.S.C. Section 10746.

In conclusion, our holding is necessarily narrow. In the ordinary case a railroad employee engaged in the transportation of coal may well not qualify for benefits under the Act. The demanding tests of function and situs must be met, as they were in this case. After the coal is prepared and reloaded for shipment, a railroad employee would not satisfy the function test. And the possibility of satisfying the situs requirement diminishes as the distance traveled on the rails increases, rendering the employment other than "in or around a coal mine." If a claimant fulfills all the statutory requirements, however, as Roberson has here, we decline to hold that his status as a railroad employee negates his recovery of benefits under the Act to which he otherwise would be entitled.

The order of the Board which has been reviewed is

AFFIRMED

FILED
MAR 19 1991
OFFICE OF THE CLERK

(3)

Case No.: 90-1271

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner

V.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

RESPONDENT ROBERSON'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Robert Austin Vinyard, Esq.
Lawrence L. Moise, III, Esq.
VINYARD & MOISE
Attorneys at Law, P.C.
116 East Valley Street
P. O. Box 1127
Abingdon, VA 24210

Counsel for Olen Roberson

BEST AVAILABLE COPY

QUESTION PRESENTED

Did Congress intend that a railroad worker, engaged in the transportation of coal in or around a coal mine can qualify as a "miner" within the meaning of Section 402(d) of the Black Lung Benefits Act, as amended, 30 U.S.C. 902(d)(1988), and thereby qualify for benefits under the Act?

LIST OF PARTIES

The names of the parties to the proceeding are contained in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENT	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISIDCTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	
I. The Court Of Appeal's Ruling that Congress Intended To Include Railroad Workers Within The Scope Of The Black Lung Benefits Review Act Is Supported By The Plain Language Of The Act And Consistent With The Act's Purpose	5
II. The Federal Courts Have Not Issued Conflicting Interpretations Of The Coverage Of Railroad Workers Under The Black Lung Benefts Act	10
CONCLUSION	10
APPENDIX	
Opinion of the Court of Appeals in *Norfolk & Western Railway Company v. Olen Roberson and Director, Office of*	

Workers' Compensation Programs, United States Department of Labor, 918 F.2d 1144 (4th Cir. 1990) 1a

TABLE OF AUTHORITIES

Cases

	Page
Chevron, U.S.A., Inc. v. Natural Resource Defense Council, 467 U.S. 837 1984	5,7,9
Louisville and N.R.R. v. Donovan, No. 89-6111-L(g)(W.D. Ky. 1981) rev'd on other grounds, 713 F.2d 1243 (6th Cir.1983) cert. denied 466 U.S. 936 (1984)	5,10
Louisville and N.R.R. v. Donovan, 713 F.2d 1243 (6th Cir.1983) cert. denied 466 U.S. 936 (1984)	10
Roberts v. Weinberger, 527 F.2d 600 (4th Cir. 1975)	9
Young v. Clinchfield Railroad Company, 288 F.2d 499 (4th Cir. 1961)	6

Statutes & Rules

Black Lung Benefits Act, as amended 30 U.S.C. Section 901, et seq Section 402(d), 30 U.S.C. Section 902(d) 1988	passim
Black Lung Benefits Reform Act of 1977 Pub. L. No. 95-239 92 Stat. 95	2
Section 2(b), 92 Stat. 95	2
20 C.F.R. Section 725.101	8
Federal Employer's Liability Act 45 U.S.C. Sections 51-60 (1988)	4

45 U.S.C. Section 58 7

Railroad Retirement Act, 45 U.S.C. Section 231-31u (1988) 4,6

Railroad Unemployment Insurance Act 45 U.S.C. Section 351, et seq. 4

28 U.S.C. Section 1254 (1) (1988) 1

Other Authorities

H. Conf. Reb. No. 864 95th Cong. 2d. Sess. *reprinted* in 2 U.S. Code Cong. & Admin. News 308-09 (1978) 9

S. Rep. No. 95-209, 95th Cong. 1st Sess. 21 (1977) 9

Case No.: 90-1271

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner

V.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

RESPONDENT ROBERSON'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 918 F.2d 1144 and is reprinted in the Appendix to the Brief ("App.") at 1a.

The September 29, 1989 decision of the United States Department of Labor Benefits Review Board, the administrative decision reviewed by the Court of Appeals, reported at 13 BLR (Black Lung Reporter) 1-6.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on November 16, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)(1988). The Petition for Writ of Certiorari was filed with this Court on February 11, 1991

in compliance with the time period provided by Supreme Court Rule 13.1.

STATUTES INVOKED

Black Lung Benefits Act ("BLBA"), Section 402(d), 30 U.S.C. Section 902(d)(1988), as amended by Section 2(b) of the Black Lung Benefits Reform Act of 1977 ("1977 Amendments"), Pub. L. No. 95-239, 92 Stat. 95:

> The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

STATEMENT OF THE CASE

I. Material Proceedings Below

This matter arose on February 24, 1978, upon the filing of a claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. Section 901 et seq. by the Claimant, Olen Roberson, (Director's Exhibit, "DX," 1). The Deputy Commissioner initially approved the claim and named Norfolk & Western Railway (hereinafter referred to as Railroad) as the responsible operator potentially liable for the payment of benefits (DX 11, 17, 20). The Deputy Commissioner later determined that Roberson's activities did not fall within the definition of a miner, and denied benefits. Claimant thereafter requested a formal hearing before the Office of Administrative Law Judges. The hearing was held in Abingdon, Virginia, on July 15, 1985 before Administrative Law Judge, Lawrence E. Gray. The Administrative Law Judge issued a Decision and Order awarding benefits on December 30, 1986. The Railroad timely appealed and filed a Petition for Review and supporting brief with the Benefits Review Board. The

Claimant and Director filed responding briefs. The Benefits Review Board issued a Decision and Order on September 29, 1989 affirming the decision of the Administrative Law Judge. The Railroad then appealed the decision to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals issued an Opinion on November 16, 1990 affirming the Decision and Order of the Benefits Review Board. The Railroad filed its Petition for a Writ of Certiorari with this Court on or about February 11, 1991. The Respondent, Roberson, by Counsel, received the Petition for a Writ of Certiorari on February 19, 1991.

II. Statement of Facts

At the time of the hearing, Mr. Roberson was a disabled 68 year old man who had completed the ninth grade. Mr. Roberson worked for the N & W Railroad from October 10, 1947 to October 1, 1979. The Administrative Law Judge (hereinafter referred to as ALJ) found that the 14 years of Mr. Roberson's work for the railroad between 1956 and 1973 qualified as the work of a miner (coal transportation worker). The ALJ further concluded that Mr. Roberson had been exposed to coal dust during the period of time he was employed as a coal transportation worker. There is absolutely no doubt that Mr. Roberson suffers from a totally disabling respiratory impairment. The Railroad has abandoned its arguments in regard to Mr. Roberson's eligibility for benefits from a medical standpoint.1

III. The Court of Appeals Decision

The Court of Appeals for the Fourth Circuit affirmed the Decision of the Benefits Review Board in its entirety. The Court of Appeals ruled that the plain language of BLBA Section 402(d) included railroad workers, such as Mr. Roberson, who were exposed to coal dust while involved in the transportation of coal in or

---

1 The Employer does not raise any eligibility issues involving medical questions in the Petition for a Writ of Certiorari.

around a coal mine. App. pg. 5a. The Court of Appeals noted in a footnote that even if the language of the BLBA had been unclear and a resort to the legislative history had been undertaken, the Court's decision would have remained the same. App. pg 7a. The Court of Appeals concluded its opinion by noting that its holding was narrow in scope, applying only in cases of railroad workers exposed to coal dust who were engaged in the transportation of coal or in or around a coal mine who met the tests of function and situs. App. pg. 11a.

SUMMARY OF THE ARGUMENT REASONS FOR NOT GRANTING THE WRIT

The Railroad advances three major arguments in support of the Petition for a Writ of Certiorari. First, the Railroad argues that since railroad workers already fall within a comprehensive scheme of federal legislation (Federal Employer's Liability Act, 45 U.S.C. Sections 51-60 (1988); the Railroad Retirement Act, 45 U.S.C. Section 231-31u (1988)), the Railroad Unemployment Insurance Act 45 U.S.C. Section 351, et seq. that Congress did not intend to extend the coverage of the BLBA to railroad workers. However, the BLBA is materially different from the Federal Employers liability Act, Railroad Retirement Act and the Railroad Unemployment Insurance Act. Additionally, none of these statutes indicate a Congressional intent to preclude other federal remedial legislation from applying to railroad workers.

Secondly, the Railroad contends that the legislative history in regard to Section 402(d) of BLBA reveals a Congressional intent to exclude railroad workers from the Act's coverage. However, just the contrary is true. The plain language of Section 402(d) reveals that Congress included coal trans-portation workers who worked "in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment."

Finally, the Railroad argues that the Court of Appeal's decision in this case conflicts the United States District Court decision in *Louisville & N.R.R. v. Donovan*,

No. 89-6111-L(G)(W.D. Ky. 1981), rev'd on other grounds, 713 F.2d 1243 (6th Cir. 1983), cert. denied, 466 U.S. 936(1984) (hereinafter referred to as Louisville & N.R.R.). Additionally, the Court of Appeals for the Sixth Circuit reversed the District Court in Louisville & N.R.R. The District Court's reasoning in Louisville & N.R.R. is not in accord with this Court opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Furthermore, the legislative history upon which the District Court in Louisville & N.R.R. relied, was the Senate Report No. 209 95th Cong., 1st Sess. 21(1977). As the Court of Appeals pointed out the "Senate Bill did not prevail and the subsequent Conference Committee Report contains no language excluding railroad workers or any other specific set of transportation workers from the definition of miner; . . .". App. pg 7a.

ARGUMENT

I. The Court of Appeal's Ruling That Congress Intended To Include Railroad Workers Within The Scope Of The Black Lung Benefits Act Is Supported By The Plain Language Of The Act And Is Consistent With the Act's Purpose.

First, the Railroad states that there are other Federal programs specifically designated for railroad employees that provide adequate exclusive remedies for railroad employees. One of the Acts the Railroad lists is the Federal Employer's Liability Act, 45 U.S.C. Section 51 et seq. (hereinafter referred to as "FELA"). The FELA essentially is a Federal worker's compensation system for railroad employees. It takes the place of state worker's compensation remedies. The Railroad goes on to argue that FELA is an exclusive remedy and therefore it would be inconsistent to allow railroad employees to make claims under the Federal Black Lung Benefits Act. Yet, the flaw in this argument is clear. A worker that works in an underground coal mine has the protection of state worker's compensation laws just as the railroad employee has the

protection of the FELA. Just as it was necessary for Congress to step in and provide an additional worker's compensation program to underground and surface coal miners for Black Lung (in essence to supplement the state worker's compensation programs until those programs came up to Federal standards in providing protection for occupationally acquired coal worker's pneumoconiosis), Congress stepped in and provided the same additional protection for railroad employees who fall within the working parameters of the coal mining industry.

The Railroad cites case law supporting the argument that occupational disease claims may be made under FELA. However, such claims can only succeed upon a basis of some common law theory of liability, such as negligence. See *Young v. Clinchfield Railroad Company*, 288 F.2d 499 (4th Circuit, 1961). The Railroad also argues that if railroad workers can receive Federal Black Lung benefits, then they would be able to draw both Federal Black Lung and FELA benefits for the same exposure and injury. The Railroad provides no support for this argument. The offset that applies for miners who receive overlapping state and federal benefits would also apply in the case of railroad employees qualifying for both Federal Black Lung benefits and FELA benefits.

The Railroad also discusses the Railroad Retirement Act of 1974, 45 U.S.C. Section 231, et seq. The Railroad argues that to permit a retired railroad worker to collect benefits under the Railroad Retirement Act and the Federal Black Lung Benefits Act allows for double compensation. However, Railroad Retirement Act benefits are received by railroad workers in lieu of Social Security benefits. Certainly, the Railroad must know that many disabled coal miners receive Federal Black Lung benefits along with their Social Security benefits. The Railroad's argument of double compensation has no merit.

Mr. Roberson would agree that Congress has put in place a comprehensive federal statutory scheme providing benefits to railroad employees. However, contrary to the Railroad's contention, Mr. Roberson argues that it is

reasonable to conclude that Congress also intended to provide additional protection to railroad employees exposed to coal dust while engaging in the working parameters of the coal mining industry. Thus, the Federal Black Lung Benefits Act is part of the comprehensive federal statutory scheme that Congress has provided for railroad employees. As the Court of Appeals noted in its opinion, the other federal legislation mentioned by the Railroad does not indicate a Congressional intent to preclude railroad workers from the BLBA. App. pg. 8a. In fact, the FELA specifically states at 45 U.S.C. Section 58:

> Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

The second argument advanced by the Railroad revolves around the legislative history of the BLBA, particularly the 1977 Amendments incorporated into the Black Lung Benefits Reform Act of 1977. However, there must be a finding that the statutory language being scrutinized is unclear or ambiguous as to what Congress intended before resorting to an analysis of the legislative history. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (hereinafter referred to as Chevron). The statutory language in question is found in BLBA Section 402(d) which defines the term "miner" as follows:

> Any individual who works or has worked in or around a coal mine or a coal preparation facility in the extraction or prep-aration of coal. Such term also includes an individual who works or has worked in coal mine construction or trans-portation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment. (emphasis added).

The Court of Appeals concluded that the plain language of Section 402(d) included "transportation

workers who were involved in the extraction or preparation of coal, who worked in or around a coal mine and who where exposed to coal dust as a result of such employment." App. pg 5a. The Court of Appeals noted that it was not disputed that Mr. Roberson was exposed to coal dust. The Court of Appeals then addressed the two other requirements in Section 402(d): (1) Situs test (work in or around a coal mine); and (2) function test (work integral to the extraction or preparation of coal). App. pg. 5a.

If one accepts the Railroad's argument that all railroad workers are not included in the term "miner", then one would have to conclude that all coal truck drivers are also not included, which is clearly not the case. Furthermore, one cannot consider the issue of miner without considering also the issue of what is defined as a "mine" since the "miner" definition hinges on a complete and full understanding of the definition of "mine". A coal mine is defined at 20 C.F.R. Section 725.101 the regulations (23):

> "Coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon or under or above the surfaces of such land, by any person used in or to be used in or resulting from the work of extracting in such areas of bituminous coal lignite, or anthracite, from its natural deposits in the earth by any means or method and in the work of preparing the coal so extracted and includes custom coal preparation facilities.

There is no doubt that a tipple located at a mine site is included within the definition of mine. There is also no doubt that a preparation facility is considered within the definition of "coal mine". A rail transportation system that connects the tipple and the preparation facility is a

transportation facility falling within the definition of a "coal mine".

The Court of Appeals in concluding that Mr. Roberson satisfied both the situs and function tests noted that Mr. Roberson's work on the railroad was almost exactly the same as the work performed by the truck driver in *Roberts v. Weinberger*, 527 F.2d 600(4th Cir. 1975), hereinafter referred to as *Roberts*. App. pg. 6a. In both the *Roberts* case and this case, a trans-portation worker hauled raw coal from a coal mine site to a preparation facility and was exposed to coal dust as a result of such work. The only difference between the two cases, is that the claimant in Roberts hauled the raw coal by truck as opposed to the use of a train in this case.

Although the Court of Appeals ruled that the language of Section 402(d) was clear and unambiguous as to the Congressional intent, thereby negating a need to resort to the legislature history of the Act, the Court went on to conclude that even if the legislative history is considered the same result is reached. App. pg. 7a. The Court of Appeals found the Railroad's reliance on Senate Report No. 209, 95th Cong., 1st Sess. 21 (1977) to be misplaced. The Senate bill did not prevail and the Conference Report, (H. Conf. Rep. No. 864, 95th Cong. 2d Sess., reprinted in 2 U.S. Code Cong. & Admin. News 308-09 (1978)) "contained no language excluding railroad workers or any other specific set of transportation workers from the definition of miner ..." App. pg. 7a. The Court of Appeals thus concluded that the Director's interpretation of the Act still would be a permissible one and one that must be given effect pursuant to a *Chevron* analysis. App. pg. 7a.

The legislative history is far more confusing than the plain language of the statute. If Congress did not wish to include railroad workers within the definition of miner it could easily have done so. The Court of Appeals' analysis is rational and is in accordance with the law. Thus, the Court should deny the Railroad's Petition for a Writ of Certiorari.

II. The Federal Courts Have Not Issued Conflicting Interpretations Of The Coverage Of Railroad Workers Under The BLBA.

The Railroad has urged the Court to grant its Petition for a Writ of Certiorari on the ground that there are conflicting federal court decisions on whether railroad workers are covered under the Black Lung Benefits Act. However, the Court of Appeals decision in this case is the only current federal court decision on the issue which stands. The only other federal court to address the issue was the Federal District Court for the Western District of Kentucky in the case of *Louisville & N.R.R. v. Donovan*, No. 80-0611-L(G)(W.D. Ky. 1981). However, the Court of Appeals for the Sixth Circuit reversed the District Court decision for lack of subject matter jurisdiction. *Louisville & N.R.R. v. Donovan*, 713 F.2d 1243 (6th Cir. 1983) cert denied, 466 U.S. 936 (1984). The Court of Appeals for the Sixth Circuit in reversing the District Court in *Louisville & N.R.R.* specifically questioned the District Court's interpretation of the legislative history of the 1977 amendments *Louisville & N.R.R., supra*. 713 F.2d at 1247-49. However, the Court of Appeals for the Sixth Circuit concluded that this issue was not properly before the Court and thus could not be resolved by the Court. *Louisville & N.R.R., supra*. 713 F.2d at 1248, 1249. There is no conflict among or between the circuits on the issue in question. Thus, the Court should deny the Railroad's Petition for a Writ of Certiorari.

CONCLUSION

The Court of Appeals found the plain language of Section 402(d) of the BLBA clearly revealed a Congressional intent to bring a small group of railroad workers within the scope of the BLBA. Even if the legislative history is used for guidance, the Director's interpretation of Section 402(d), which includes coverage of railroad workers transporting raw coal from a coal mine site to a preparation facility, is a permissible construction of the Act which must be given effect under a Chevron analysis. Notwithstanding the Railroad's contention to the contrary

there exists no conflict among or between the Circuits on the issue involved in the case at bar. Furthermore, the decision by the Court of Appeals is a narrow holding and will impact on only a small group of railroad workers. Clearly, there are many railroad workers who have transported coal after the extraction and preparation processes have been completed and are exposed to a substantial amount of coal dust. Whether rightly or wrongly, these workers have been excluded from the protection of the Black Lung Benefits Act. Yet, there is a subclass of railroad workers who performed a substantial portion of their employment for the railroad transporting coal from a mine site directly to a preparation facility. Mr. Roberson falls within that subclass of railroad workers.

WHEREFORE, for the reasons expressed herein, the Respondent, Olen Roberson, by Counsel prays that the Honorable Supreme Court of the United States deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Robert Austin Vinyard, Esq.
Lawrence L. Moise, III, Esq.
VINYARD & MOISE, P.C.
116 East Valley Street
P. O. Box 1127
Abingdon, VA 24210

Counsel for Respondent
Olen Roberson

Date: March 11, 1991

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the Court of Appeals in *Norfolk & Western Railway Company v. Olen Roberson and Director, Office of Workers' Compensation Programs, United States Department of Labor*, 918 F.2d 114 (4th Cir. 1990) 1a

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2192

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

versus

OLEN R. ROBERSON; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

ASSOCIATION OF AMERICAN RAILROADS,

Amicus Curiae.

On Petition for Review of an Order of the Benefits Review Board. (87-235-BLA)

Argued: April 4, 1990
Decided: November 16, 1990

Before WIDENER, PHILLIPS, and WILKINSON*, Circuit Judges

---

* Judge Wilkinson was a member of the panel which heard oral argument in the case, but he later recused himself. The decision is filed by a quorum of the panel 28 U.S.C. 46(d).

Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge Phillips joined.

ARGUED: William Beverly Poff, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Petitioner. Elizabeth Hopkins, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Lawrence Lee Moise, III, VINYARD AND MOISE, P.C., Abingdon, Virginia, for Respondents. ON BRIEF: Clinton S. Morse, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia; Douglas A. Smoot, JACKSON & KELLY, Charleston, West Virginia, for Petitioner. Robert P. Davis, Solicitor of Labor, Allen H. Feldman, Associate Solicitor for Special Appellate and Supreme Court Litigation, Steven J. Mandel, Counsel for Appellate Litigation, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Robert Austin Vinyard, VINYARD AND MOISE, P.C., Abingdon, Virginia, for Respondents. J. Thomas Tidd, Daniel Saphire, ASSOCIATE OF AMERICAN RAILROADS, Washington, D.C.; Ralph J. Moore, Jr., John Townsend Rich, Alok Ahuja, SHEA & GARDNER, Washington, D.C., for Amicus Curiae.

Widener, Circuit Judge:

Norfolk & Western Railway Company (N & W) petitions for review of a decision and order of the Benefits Review Board affirming an order of an Administrative Law Judge (ALJ) that awarded benefits under the Black Lung Benefits Act, 30 U.S.C. Sections 901, et seq. (Act), to Olen R. Roberson, a retired N & W employee. Both the ALJ and the Board concluded that N & W qualified as a coal mine operator under the Act and that Roberson qualified as a coal miner who was entitled to benefits. We affirm.

Olen R. Roberson worked as a brakeman and conductor for N & W from 1947 to 1979. The parties do not dispute that the initial and final periods of his employment, from 1947 to 1956 and from 1973 to his retirement in 1979, did not constitute coal mine employment. Between 1956 and 1973, however, Roberson worked on N & W runs that delivered empty railroad cars to mine sites to be loaded with raw coal and which then hauled the raw coal from the mines to a coal preparation plant where the coal was washed, cleaned, graded and reloaded for further shipment.

One of the principal crews with which Roberson worked made the "Carbo Run," which originated in Carbo, Virginia.1 This crew traveled from Carbo thirty miles to Richlands, Virginia, where it picked up empty coal cars and delivered them to a Jewel Ridge Coal Company mine located some six miles away. The crew then transported the raw coal back to Carbo to the Clinchfield Coal Company preparation plant, a distance of thirty-six miles. The entire run took twelve to fourteen hours to complete. Roberson's crew also transported raw coal to the Clinchfield preparation plant from mines in Duty, Virginia, an eight to ten mile run that could be accomplished two or three times in one day.

---

1 The ALJ credited Roberson with 14 years of coal mine employment based on his testimony that he worked on the Carbo Run a total of 14 years.

judicial deference, if the Director urges us to adopt the Board's interpretation, our analysis is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Newport News Shipbuilding and Dry Dock Co. v. Howard*, 904 F.2d. 206, 208 (4th Cir. 1990).

Under *Chevron* we first must ask whether Congress directly has addressed the precise issue in dispute. *Chevron*, 467 U.S. at 842. If so, the court and the agency must give effect to unambiguous Congressional intent. *Chevron*, 467 U.S. at 842-43. If Congressional intent is unclear or ambiguous, however, we must determine only whether the Director's interpretation is based on a permissible construction of the Act; we may not substitute our own construction of the Act for a reasonable one made by the Director. *Chevron*, 467 U.S. at 844; *Howard*, 904 F.2d at 209.

Our starting point, of course, is the language of the Act, which defines a miner as

> any individual who works or has worked in or around a coal mine or a coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

30 U.S.C. Section 902(d) (emphasis added). Thus, the plain language of the statute requires the inclusion in the definition of miner of transportation workers who were involved "in the extraction or preparation of coal," who worked "in or around a coal mine," and who were "exposed to coal dust as a result of such employment." Because N & W does not dispute Roberson's exposure to coal dust, we turn to the other two inquiries, which often are described as the requirements of situs and function. *Eplion*, 794 F.2d at 937.

Roberson's duties included coupling and uncoupling high pressure air hoses between the cars, which blew coal dust into the air, setting and releasing brakes, and obtaining loading numbers and tags from the individual cars. Because most of Roberson's tasks were performed while the train was stationary, Roberson spent a significant portion of his workday at the mine sites and the preparation plant. At times, Roberson "walked" a hundred cars at a time. In addition, coal dust also blew off the tops of the loaded railroad cars during the trips between the mines and the preparation plant. Thus, although Roberson never participated in the actual loading or unloading of coal, he was continually exposed to large amounts of coal dust. Roberson applied for black lung benefits in 1978, one year before his retirement.

The ALJ determined that N & W's coal hauling activities qualified it as the responsible operator under the Act and that Roberson qualified as a miner who was entitled to benefits. Finally, the ALJ concluded pursuant to the interim presumption in 20 C.F.R. Section 727.203(a) that Roberson is totally disabled from pneumoconiosis due to coal mine employment, and that N & W failed to rebut the presumption.2 The Board found that each of the ALJ's conclusions was supported by substantial evidence. See 33 U.S.C. Section 921(b)(3).

Our review of the Board's order is governed by section 21 of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. Section 921. 30 U.S.C. Section 932(a). Specifically, we must uphold the Board's resolution of questions of statutory construction or application of the Act to a specific set of facts if it is supported by a reasonable factual and legal basis. *Eplion v. Director, OWCP*, 794 F.2d 935, 936 (4th Cir. 1986). In addition, the Director urges us to adopt the Board's interpretation of the Act. Although the Board's interpretation standing alone is not entitled to special

---

2 N & W does not challenge on review the findings of the ALJ and Board on this issue, so the Board's finding of disability stands as ordered.

In affirming an order of the Board denying black lung benefits to a claimant whose job entailed knocking open doors to railroad cars so that coal could be loaded into barges, we emphasized that "[claimant] was not involved in transporting the coal before it was prepared. The coal was already processed and prepared for market before [claimant] had any contact with it." Eplion, 794 F.2d at 937. We concluded in Eplion, therefore, that the claimant failed to qualify as a miner under the Act because he did not meet the situs and function tests set forth in the statute.

In contrast to *Eplion*, the ALJ's undisputed findings of fact in this case are that Roberson was involved in hauling raw coal from extraction sites (mines) to the preparation plant, which also is considered a coal mine under the Act. See 30 U.S.C. Section 802(h)(2). Transporting raw coal to a preparation plant plainly is part of the preparation of coal, and Roberson therefore satisfies the function test. In addition, the ALJ specifically found that because Roberson did a lot of his work while the train was parked at the mine sites and the preparation plant, Roberson spent "a significant portion of time" in or around a coal mine, as defined by the statute. Therefore, Roberson also satisfies the situs test.

Except for the mode of transportation involved, and perhaps the distance traveled, this case is indistinguishable from *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975). In *Roberts* we determined, three years before the 1978 amendment to the statute expressly included transportation workers in the definition of miner, that a truck driver who hauled coal between a strip mine and the tipple qualified as a miner entitled to benefits under the Act. Just as Roberson did in the case at hand, the truck driver in *Roberts* hauled coal from the extraction site to the tipple, where it was processed, graded, and reloaded for further shipment. *Roberts*, 527 F.2d at 601. We reasoned that the driver's functions

> were part of the process of "extracting the coal and preparing the coal so extracted." The coal was not extracted and prepared

> until it was taken from the mine to the place where it was processed and graded so as to be in condition for delivery to distributors and consumers.

Roberts, 527 F. 2d at 602. Because we concluded in *Roberts* that the Act "is unambiguous in extending coverage" to the truck driver, *Roberts*, 527 F.2d at 602, we have little difficulty in concluding that the plain language of the Act, especially when reinforced by the 1978 amendment, manifests a clear Congressional intent to include in the definition of miner a small group of transportation workers of which Roberson was a member.

N & W advances several arguments in an attempt to distinguish *Roberts* and establish that railroad employees are fundamentally different from other transportation workers. First, it relies extensively on the legislative history to the 1978 amendments to the Act. Because we conclude that the plain language of the Act supports the Board's decision, however, we "must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843, and we have no need to resort to the Act's legislative history.3

---

3 Even if we found the language of the Act unclear and resorted to the legislative history, our result would be no different. N & W relies on Senate Report No. 209 95th Cong., 1st Sess. 21 (1977), which states concerning the definition of miner that "[t]he provision does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line unless such company also operates a mine." The floor manager of the Senate bill, Senator Randolph, made a similar statement during floor debate. The Senate bill, however, did not prevail, and the subsequent Conference Committee Report contains no language excluding railroad workers or any other specific set of transportation workers from the definition of miner; indeed, the Conference Report sticks closely to the literal language of the statute, as have we. H. Conf. Rep. No. 864, 95th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Admin. News 308-09(1978). Because the Conference Report "represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of congressional intent behind the enactment

Second, N & W argues that allowing a railroad employee to recover under the Act would be inconsistent with other federal legislation that already protects railroad employees from disability or injury, such as the Federal Employers' Liability Act, 45 U.S.C. Section 51 et seq., the Railroad Retirement Act, 45 U.S.C. Sections 231 et seq.4 and the Railroad Unemployment Insurance Act 45 U.S.C. Sections 351. et seq. We dissagree. Not only do the statutes differ in certain material respects (the FELA, for example, requires employer negligence, 45 U.S.C. Section 51, while the Black Lung Act does not), none of the other statutes indicate that Congress intended them to preclude the availability of other federal remedial legislation. Instead, the FELA, upon which N & W principally relies, does just the opposite. See 45 U.S.C. Section 58 ("Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress."). So that argument is, we think, without merit.

---

of a statute." Davis v. Lukhard, 788 F.2d 973, 981 (4th Cir.), cert. denied, 479 U.S. 868 (1986). Thus, even if we looked to the legislative history for guidance, the Director's interpretation of the Act still would be a permissible one that we should not set aside. Chevron, 467 U.S. at 843-44. N & W's reliance on Fox v. Director, OWCP, 889 F.2d 1037 (11th Cir. 1989), which cited the Senate Report in the course of determining that a coke oven worker was not a miner, is unpersuasive. The Fox court did not explain why it resorted to the legislative history of a version of a bill that was not adopted, quite possibly because the passage was not essential to the court's holding. In light of the fact that a coke oven is a consumer of coal, the Fox court understandably found that the coke oven worker was not involved in the preparation of coal under the Act. Fox, 889 F.2d at 1042-43. ("[T]he processing and use of the minerals by subsequent consumers is not a part of that process." 889 F.2d. at 1040)

4 N & W has moved to supplement the appellate record in this case to include a letter indicating that Roberson was granted an annuity pursuant to the Railroad Retirement Act based on occupational disability. Although we grant N & W's motion to supplement the record, the letter does not change our analysis for the reasons indicated in the text.

N & W also contends that, as an industry exclusively regulated by the Interstate Commerce Commission (ICC), railroads are uniquely different from other carriers because all their services are considered to be part of interstate commerce. We know of no part of the Act, the regulations, or any reported case interpreting the Act or regulations, however, that distinguishes a common carrier or transportation worker on the basis of connections with interstate commerce. Indeed, in *Roberts* we found that the truck driver qualified as a miner despite conflicting evidence as to whether he was employed by the coal company or a trucking subcontractor. *Roberts*, 527 F.2d at 602. The Fifth Circuit recognized, in *Freeman v. Califano*, 600 F.2d 1057, 1060 & n.2 (5th Cir. 1979), that *Roberts* implicitly rejected an argument that the nature of the employer could make for differing results ("The Fourth Circuit evidently deemed this question unimportant . . . . "), and went on to hold that "nothing in [the Act] or the regulations indicates that application of the presumption should turn on the nature of the employer's business rather than the nature and location of the work done." Also, we do not think that the result in *Roberts* would have been different had a state line lain between the mine and the tipple, and we reject N & W's argument.

Within N & W's many references to the ICC and the federal regulatory statutes, however, is a simpler and somewhat more persuasive argument. In the midst of its recitation of statutes and regulations, N & W also argues that the interstate commerce aspects of its business, and the fact that the Carbo Run covered thirty-six miles, take Roberson's employment out of the statutory definition of employment "in or around a coal mine" and "in the extraction or preparation of coal." As we noted earlier, however, the ALJ found, and N & W does not dispute, that Roberson spent a significant portion of his workday actually at the mines and preparation plant, and that Roberson was engaged in hauling raw coal between two statutory "mines." Thus, N & W's argument, though undoubtedly valid with respect to many of its employees who haul coal, is without merit as to this particular claimant.

Even if Roberson meets the statutory definition of miner, N & W also asserts that it cannot be an operator under the Act. The relevant statute defines operator as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. Section 802(d) (emphasis added). In addition, the applicable regulations provide that "any employer of a miner as defined in Section 727.202(a) shall, to the extent appropriate, be considered an operator for the purposes of this part . . . ." 20 C.F.R. Section 725.491(a). Because we have concluded that Roberson meets the statutory definition of miner, the regulation defines N & W as an operator if "appropriate."

In *Old Dominion Power Co. v. Donovan*, 772 F.2d 92, 96 (4th Cir. 1985), we concluded that Congress intended to include within the definition of operator only those independent contractors who maintain a continuing presence at a mine. Because Old Dominion's employees normally were present at the mine site only once a month to read the meter, we concluded that Old Dominion was not an operator under the statute. By contrast, the ALJ found here that N & W maintained a continuing presence at the mine site and performed services essential to the preparation of the coal. We conclude that N & W appropriately was considered the responsible operator under the Act.5

---

5 N & W argues that classifying it as an operator would place the railroad in violation of federal law because railroads are prohibited from transporting commodities that are "manufactured, mined, or produced by the carrier or under its authority." 49 U.S.C. Section 10746. However, neither Roberson nor the Director ever has asserted that N & W actually mined or supervised the mining of coal, and considering N & W an operator under the plain language of the Act does not alter what the parties do not dispute. The fact that an employer may be a statutory operator under 30 U.S.C. Section 802(d) and 20 C.F.R Section 725.491(a) does not mean that the coal involved was "manufactured, mined or produced" by the employer within the meaning of 49 U.S.C. Section 10746.

In conclusion, our holding is necessarily narrow. In the ordinary case a railroad employee engaged in the transportation of coal may well not qualify for benefits under the Act. The demanding tests of function and situs must be met, as they were in this case. After the coal is prepared and reloaded for shipment, a railroad employee would not satisfy the function test. And the possibility of satisfying the situs requirement diminishes as the distance traveled on the rails increases, rendering the employment other than "in or around a coal mine." If a claimant fulfills all the statutory requirements, however, as Roberson has here, we decline to hold that his status as a railroad employee negates his recovery of benefits under the Act to which he otherwise would be entitled.

The order of the Board which has been reviewed is

AFFIRMED

No. 90-1271

FILED
APR 12 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

OLEN ROBERSON, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT P. DAVIS
Solicitor of Labor

STEVEN J. MANDEL
Deputy Associate Solicitor

ELIZABETH HOPKINS
Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a railroad worker who works in or around a coal mine or coal preparation facility in employment that is integral to the extraction or preparation of coal is a "miner" within the statutory definition of that term in the Black Lung Benefits Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	4
Fox v. *Director, OWCP*, 889 F.2d 1037 (11th Cir. 1989)	12
Hallstrom v. *Tillamook County*, 110 S. Ct. 304 (1989)	6
Hanna v. *Director, OWCP*, 860 F.2d 88 (3d Cir. 1988)	7
Harmon Mining Corp. v. *FMSHRC*, 671 F.2d 794 (4th Cir. 1981)	8
Louisville & N. R.R. v. *Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981), 713 F.2d 1243 (6th Cir. 1983), cert. denied, 466 U.S. 936 (1984)	10, 11, 12
Mitchell v. *Director, OWCP*, 855 F.2d 484 (7th Cir. 1988)	7
Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987)	13
Otis Elevator Co. v. *Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990)	10
Roberts v. *Weinberger*, 527 F.2d 600 (5th Cir. 1975)	8
Southard v. *Director, OWCP*, 732 F.2d 66 (6th Cir. 1984)	7
Stroh v. *Director, OWCP*, 810 F.2d 61 (3d Cir. 1987)	7, 13
West Virginia University Hospitals, Inc. v. *Casey*, No. 89-994 (Mar. 19, 1991)	8, 9

Statutes, regulations and rule: Page

Whisman v. *Director, OWCP*, 8 Black Lung Rep. 1-96 (Ben. Rev. Bd. June 17, 1985) 2, 13

Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* § 402(d), 30 U.S.C. 902(d) 3, 4, 5, 6-7, 9, 10, 11

Black Lung Benefits Act of 1977, Pub. L. No. 95-239, § 2(b), 92 Stat. 95 (30 U.S.C. 902(d)) 9

Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*:

45 U.S.C. 51 5

45 U.S.C. 58 ..... 5, 10

Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* 7

30 U.S.C. 802(h)(2) 8

20 C.F.R.:

Pt. 725:

Section 725.101(a)(22)-(25) 8

Section 725.101(a)(26) 7

Section 725.202(a) 4

Section 725.491(a) 3

Pt. 727 2

Sup. Ct. R. 10.1 11

Miscellaneous:

H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978) 9

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1271

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

OLEN ROBERSON, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 918 F.2d 1144. The decision of the Benefits Review Board (Pet. App. 17a-28a) and the decision of the administrative law judge (App., *infra*, 1a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1990. The petition for a writ of certiorari was filed on February 11, 1991. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Norfolk & Western Railway Company (N&W) employed respondent Olen R. Roberson as a brakeman and conductor from 1947 until his retirement in 1979. Between 1956 and 1973, Roberson worked on rail cars used to haul raw coal from several coal extraction sites to a preparation plant where the coal was cleaned, washed, graded, and loaded for delivery. His duties at those locations included coupling and uncoupling hoses between the railroad cars, setting and releasing brakes, and obtaining loading numbers from individual cars. Although he rode on the trains from the extraction sites to the preparation plant, a distance as far as 36 miles, his duties required him to spend a significant part of his workday at the extraction and preparation sites, where he was exposed to large amounts of coal dust. Pet. App. 3a-4a.

Roberson filed an application for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, which provides benefits to coal miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. Following an evidentiary hearing, an administrative law judge determined that Roberson had established entitlement to benefits under the interim regulations, 20 C.F.R. Pt. 727, and ordered N&W, as the responsible operator, to pay those benefits. App., *infra*, 1a-15a. Applying the three-pronged "status/function/situs" test of coverage established by the Benefits Review Board in *Whisman* v. *Director, OWCP*, 8 Black Lung Rep. 1-96, 1-97 (Ben. Rev. Bd. 1985), the ALJ determined that between 1956 and 1973, Roberson primarily worked with raw rather than processed coal (status), that his work transporting coal from the extraction

sites to the preparation plant during that period was integral to the coal production process (function), and that he spent a significant portion of his time at the extraction and preparation sites (situs). App., *infra*, 3a-7a. The ALJ concluded that Roberson qualified as a "miner" under the Act, *id.* at 6a, and that petitioner was the operator responsible for the payment of black lung benefits, *id.* at 7a-9a. The ALJ reasoned that N&W maintained a continuing presence at the mine sites and, by transporting raw coal to the preparation plant, it provided services essential to the preparation of the coal within the meaning of the regulatory definition of "operator," 20 C.F.R. 725.491(a). App., *infra*, 9a.

2. The Benefits Review Board affirmed the ALJ's order awarding benefits. Pet. App. 17a-28a. Applying the legal standard set forth in *Whisman*, the Board concluded that there was substantial evidence supporting the ALJ's findings that Roberson transported raw coal as an integral part of the coal production process and spent a significant portion of his workday at the mine sites and preparation plant. *Id.* at 19a-22a. The Board rejected N&W's "policy-based" considerations, noting that neither the Act nor its implementing regulations specifically exclude railroad workers from coverage and that no such exclusion was intended. *Id.* at 22a. The Board also was unpersuaded that the existence of other federal statutes pertaining to disabled railroad workers limits the scope of coverage of the Black Lung Benefits Act. *Id.* at 22a-23a. Finally, the Board held that N&W was an "operator" in that it employed a "miner" and maintained a "continuing presence" at the mine. *Id.* at 23a-25a.[1]

---

[1] The Board also upheld the ALJ's finding that Roberson met the health-related requirements for benefits under

3. The court of apepals affirmed in a "necessarily narrow" holding. Pet. App. 1a-10a. Applying this Court's analysis in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court of appeals looked first to the statutory definition of a "miner" set forth in Section 402(d) of the Black Lung Benefits Act, 30 U.S.C. 902(d). The court concluded that a transportation worker who works in or around a coal mine in the extraction or preparation of coal comes within that definition under the plain language of Section 402(d). Pet. App. 4a-5a.[2] The court then determined that Roberson met this definitional test because he was involved in hauling raw coal from coal mines to the coal preparation plant, such transportation was part of the preparation process, and Roberson spent a significant amount of time in or around "coal mines," which the Act defines to include a coal preparation plant. *Id.* at 5a-6a. The court therefore had "little difficulty in concluding that the plain language of the Act, especially when reinforced by the 1978 amendment [adding a reference to "transportation" workers], manifests a clear Congressional intent to include in the definition of miner a small group of transportation workers of which Roberson was a member." *Id.* at 6a.

The court rejected petitioner's various arguments

---

the Act. Pet. App. 25a-27a. N&W did not challenge that finding in the court of appeals and does not do so in this Court.

[2] The court concluded that the statutory language also requires, in the case of a transportation worker, that the worker has been "exposed to coal dust as a result of such employment," but noted that N&W did not dispute Roberson's coal dust exposure (Pet. App. 5a). See also 20 C.F.R. 725.202(a) (providing a rebuttable presumption that a transportation worker is exposed to dust when working in or around a coal mine or coal preparation facility).

that railroad employees are fundamentally different from other transportation workers. Pet. App. 6a-9a. First, the court observed that because the "plain language" of the Act supports the Board's decision, it did not need to resort to the legislative history. *Id.* at 6a-7a. It added that, in any event, the legislative history is not to the contrary since the Conference Committee report—the "most persuasive evidence of Congressional intent"—"sticks closely to the literal language of the statute" and does not exclude railroad workers from the Act's coverage. *Id.* at 7a n.3. Second, the court rejected petitioner's argument that coverage under the Black Lung Benefits Act would be inconsistent with other federal legislation protecting railroad employees. *Id.* at 7a-8a. The court noted that there was nothing to indicate that Congress intended any of the statutes pertaining specifically to railroad workers to preclude resort to the Black Lung Benefits Act and that, in fact, the Federal Employers' Liability Act (FELA), 45 U.S.C. 51, 58, specifically provides that it is not exclusive of any other federal remedy. Pet. App. 8a.

The court of appeals found irrelevant petitioner's observation that interstate railroads are regulated by the Interstate Commerce Commission. Pet. App. 8a. The court held that the ALJ's undisputed finding that Roberson spent a significant portion of his workday at the mines and preparation plant defeated petitioner's implicit argument that Roberson's role as a crew member during the 36-mile trip from the mines to the preparation plants took him outside of the Act's "situs" and "function" requirements. *Id.* at 8a-9a. After noting that "[i]n the ordinary case" many railroad employees may not qualify for benefits, the court stated: "If a claimant fulfills all the statutory requirements, however, as Roberson has here, we

decline to hold that his status as a railroad employee negates his recovery of benefits under the Act to which he otherwise would be entitled." *Id.* at 10a.[3]

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Although petitioner suggests otherwise, the court of appeals' "necessarily narrow" (Pet. App. 10a) and fact-based holding is unlikely to have a significant impact on the railroad industry. Accordingly, further review is unwarranted.

1. Petitioner primarily contends (Pet. 9-14) that the court of appeals' determination that Roberson comes within the statutory definition of "miner" is inconsistent with the purposes and legislative history of the Act. As the court below properly noted, however, the starting point in statutory interpretation is the language of the statute. Pet. App. 5a. See *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1989). Section 402(d) of the Black Lung Benefits Act, defines a "miner" as

> any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction *or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.*

---

[3] The court also upheld the ALJ's finding that N&W qualified as an "operator" under the Act based on its continuing presence at the mines and its provision of services essential to the preparation of coal. Pet. App. 9a. Petitioner does not challenge that determination in this Court (Pet. 5 n.4).

30 U.S.C. 902(d) (emphasis added). See 20 C.F.R. 725.101(a)(26). Based on this language, the court of appeals properly concluded (Pet. App. 5a), as has every other court of appeals to address the issue, that the statute includes within its definition of "miner" *any* transportation worker involved "in the extraction or preparation of coal" who works "in or around a coal mine." [4]

The court properly applied that "situs/function" test to the facts of this case and concluded that Roberson's work during the relevant period placed him within the statutory definition of "miner." It was undisputed that Roberson hauled "raw coal from extraction sites (mines) to the preparation plant, which also is considered a coal mine under the Act." Pet. App. 5a-6a.[5] His work transporting coal to the prep-

---

[4] See, *e.g.*, *Hanna* v. *Director, OWCP*, 860 F.2d 88 (3d Cir. 1988) (tug boat operator who assisted with loading process at tipple covered); *Stroh* v. *Director, OWCP*, 810 F.2d 61, 63 (3d Cir. 1987) (self-employed truck driver who hauled coal to processing plants covered); *Southard* v. *Director, OWCP*, 732 F.2d 66, 69 (6th Cir. 1984) (applying identical analysis to question of whether transportation worker is covered); *Mitchell* v. *Director, OWCP*, 855 F.2d 485, 489 (7th Cir. 1988) (railroad employee who shoveled and cleaned out railroad cars to ready them for loading at adjacent preparation plant was covered "miner").

[5] The Federal Mine Safety and Health Act of 1977 (FMSHA), which is applicable to the Black Lung Benefits Act (subchapter IV of the FMSHA), provides:

> For the purposes of subchapters II, III, and IV of this chapter, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting

aration plant was part of the preparation process (function); and he spent a significant part of his time in or around a "coal mine" (situs). *Id.* at 6a. Indeed, the facts here are virtually "indistinguishable" (*ibid.*) from the Fourth Circuit's earlier decision in *Roberts* v. *Weinberger*, 527 F.2d 600 (1975), in which the court held that even before the 1977 amendment, the Act was "unambiguous in extending coverage" to truck drivers who haul coal between a strip mine and the tipple.

2. Although the broad statutory language contains no express or implicit exclusion for railroad workers, petitioner asserts (Pet. 7-14) that inclusion of such workers is not consistent with the Act's legislative history or purposes. As this Court recently reiterated, however, the best evidence of a statute's purpose "is the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia University Hospitals, Inc.* v. *Casey*, No. 89-994 (Mar. 19, 1991), slip op. 15. "Where that contains a phrase that is unambiguous—that has a clearly

---

> from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, *and the work of preparing the coal so extracted, and includes custom coal preparation facilities.*

30 U.S.C. 802(h)(2) (emphasis added); see also 20 C.F.R. 725.101(a)(22)-(25). This extremely broad definition of the term "coal mine" evidences congressional intent that all facilities at a preparation plant be covered. See *Harmon Mining Corp.* v. *FMSHRC*, 671 F.2d 794, 796-797 (4th Cir. 1981) (railroad tracks that were owned by railroad but that adjoined preparation plant and were on mine property constituted a facility at the preparation plant and were therefore part of mine).

accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process." *Ibid.* In any event, the purpose and legislative history of Section 402(d) support the court of appeals' construction of the term "miner."

In 1977, Congress expanded Section 402(d)'s definition of a "miner" from "any individual who is or was employed in a coal mine" to include "an individual who works or has worked in * * * transportation in or around a coal mine." The Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(b), 92 Stat. 95, codified at 30 U.S.C. 902(d). The focus of that amendment was not upon exclusion, but upon inclusion of additional workers within the Act's coverage. While the Senate Committee Report and the statement by Senator Randolph on which petitioner relies (Pet. 11-13) speak restrictively of the contours of the amended definition's coverage of transportation workers, the Conference Report specifically clarifies

> that transportation and construction workers are covered only to the extent that they work in or around a coal mine and are exposed to coal dust. The conference substitute elsewhere provides that coal mine construction and transportation employers who are not also mine operators shall not be obligated to purchase insurance * * * [but] shall be individually liable for the payment of approved claims in appropriate cases.

H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 15-16 (1978). Consistent with the language of the amended definition, the Conference Report, which

the court below properly recognized as the most persuasive evidence of congressional intent, Pet. App. 7a n.3, indicates that Congress intended the Act to cover transportation workers who work in or around coal mines and are exposed to coal dust. See *Louisville & N. R.R.* v. *Donovan*, 713 F.2d 1243, 1248 (6th Cir. 1983), cert. denied, 466 U.S. 936 (1984); cf. *Otis Elevator Co.* v. *Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990) (Congress intended to expand FMSHA's definition of "operator" in 1977 notwithstanding two limiting "snippets" of legislative history).

The court of appeals' determination is also supported by the Black Lung Benefits Act's statutory purpose of providing benefits to workers at coal mines when those workers are disabled by exposure to coal dust. Petitioners err in attaching significance (see Pet. 9-10) to the fact that railroad workers are covered by other federal legislation, since those statutes by their terms do not preclude the availability of benefits under other programs, such as the black lung benefits program. See *Louisville & N. R.R.* v. *Donovan*, 713 F.2d at 1248 n.3.[6] Nor is there any provision in the Black Lung Benefits Act that restricts coverage based on receipt of benefits under these other programs. Although petitioner argues (Pet. 10) that the existence of other federal benefit programs for railroad workers indicates that Congress could not have "intended to include railroad workers under [the Black Lung Benefits Act] with-

[6] Indeed, FELA—upon which petitioner primarly relies (Pet. 9-10)—specifically states that it does not limit rights or liabilities under other federal programs. 45 U.S.C. 58. Moreover, as the court below recognized, Pet. App. 8a, liability under FELA requires negligence, while liability under the Black Lung Benefits Act does not.

out even addressing the potential for overlapping coverage, [or] duplicative benefits," it is more reasonable to conclude that "had Congress intended to provide an exception for independent railroad companies, it would have done so." Pet. App. 25a.

3. Petitioner also contends (Pet. 14-16) that certiorari is warranted because the court of appeals' decision conflicts with the vacated decision of the district court in *Louisville & N. R.R.* v. *Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981), rev'd, 713 F.2d 1243 (6th Cir. 1983), cert. denied, 466 U.S. 936 (1984). There is no merit in this contention. As a general matter, a conflict between a court of appeals decision and a district court decision would not establish "special and important reasons" for this Court to exercise its discretionary jurisdiction, even if the lower court's decision had not been reversed on appeal. See Sup. Ct. R. 10.1.

To be sure, the Sixth Circuit specifically based its reversal in *Louisville & N. R.R.* on the district court's lack of jurisdiction to review the Department of Labor's guidelines defining "the transportation of coal" under the Black Lung Benefits Act, and it disclaimed "the intent of making any definitive construction" of the Act. But the court also stressed Congress's explicit recognition "that a person working in transportation in or around a coal mine might be exposed to coal dust as a result of such employment and should not be deprived of [Black Lung Benefits Act] benefits merely because its employer is not an 'operator' in the traditional sense." 713 F.2d at 1249. In addition, the court criticized the district court's construction of the statute as excluding the railroad industry, stating:

> The statute, however, far from clearly excluding railroads, expressly encompasses not only mine operators in the traditional sense but also "any independent contractor performing services or construction at [a] mine." 30 U.S.C. § 802(d). This expanded definition does not clearly exclude railroads, especially when viewed in conjunction with the amended definition of "miners" which includes "an individual who works or has worked in . . . transportation in or around a coal mine . . . ." 30 U.S.C. § 902(d).

713 F.2d at 1247. Thus, the court of appeals' decision in *Louisville & N. R.R.* is consistent with the court's decision in this case.

There is similarly no merit to petitioner's suggestion (Pet. 16-17) that the court of appeals' decision in this case conflicts with the Eleventh Circuit's decision in *Fox* v. *Director, OWCP*, 889 F.2d 1037 (1989). The *Fox* case involved a worker at a coke oven—not a railroad or transportation worker. The Eleventh Circuit found that the coke oven worker was not a miner because "the washing and crushing of coal performed [at the coke oven] were the first steps in the coke manufacturing process rather than the last step in the coal extraction and preparation process." *Id.* at 1042. The court relied on the Senate Report for the limited point that "coverage of coal preparation activities is contingent on such activities being an integral part of the coal production process" rather than merely "coal processing activities (such as coke production) performed by the ultimate consumer for his own use." *Id.* at 1040-1041. The Eleventh Circuit's analysis would not require a different outcome here since Roberson hauled raw—not processed—coal, and the ALJ explicitly and cor-

rectly found that Roberson's activities were an integral part of the preparation process.[7]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

STEVEN J. MANDEL
Deputy Associate Solicitor

ELIZABETH HOPKINS
Attorney
Department of Labor

APRIL 1991

---

[7] Petitioner asserts (Pet. 5-6) that the decision below will expose railroads to "thousands" of claims for black lung benefits, but can identify only 174 pending claims. Even as to those, of course, "[t]he demanding tests of function and situs must be met." Pet. App. 10a.

APPENDIX

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

OWCP No. 223-12-5682

Case No. 83-BLA-7557
IN THE MATTER OF OLEN R. ROBERSON, CLAIMANT

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
EMPLOYER

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, PARTY-IN-INTEREST

Lawrence L. Moise III, Esq.
Robert Austin Vinyard, Esq.
116 E. Valley Street
P.O. Box 1127
Abingdon, Va. 24210-1127
For the Claimant

J. Randolph Query, Esq.
Jackson, Kelly, Holt & O'Farrell
P.O. Box 553
Charleston, W. Va. 25322
For the Employer

Ronald Gurka, Esq.
Office of the Solicitor
U.S. Department of Labor
Room 1237-A
4015 Wilson Boulevard
Arlington, Va. 22203
For the Party-in-Interest

BEFORE: LAWRENCE E. GRAY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* ("the Act"). In accordance with the Act and the Regulations issued thereunder, found in Title 20 of the Code of Federal Regulations ("the Regulations"), this case was referred for hearing to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Program ("the Director"), on September 14, 1983.

A formal hearing was held in Abingdon, Virginia on July 15, 1985, at which all parties were afforded the opportunity to present evidence and argument as provided in the Act and the Regulations. The record was held open for the receipt of additional medical evidence and briefs.

Statement of the Case

Claimant Olen R. Roberson, a 68-year-old man with a 9th-grade education, seeks benefits under the Act, asserting that he is totally disabled as a result of coal workers' pneumoconiosis. Employer contests (1) whether it properly has been designated as the

responsible operator; (2) whether Claimant is a miner within the meaning of the Act and the Regulations; (3) whether Claimant has pneumoconiosis within the meaning of the Act and the Regulations; (4) if so, whether Claimant's pneumoconiosis arose out of coal mine employment; (5) whether Claimant is totally disabled within the meaning of the Act and the Regulations; and (6) whether Claimant's disability, if any, resulted from pneumoconiosis. The Director maintains that Employer properly has been designated as the responsible operator and that Claimant qualifies as a miner.

Findings of Fact and Conclusions of Law

Coal Miner

"The term 'miner' means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or arond a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. § 902(d); *see* 20 C.F.R. § 725.202(a).

Claimant commenced employment with Norfolk and Western Railway Company on October 10, 1947. Claimant worked continuously for Norfolk and Western until October 1, 1979, when Claimant retired.

Between 1947 and 1956, Claimant served as a Brakeman on certain "local runs." These trains carried "local freight"; they did not carry coal. There being no indication that Claimant's duties involved the extraction or preparation of coal. I find that Claimant was not a coal miner during this period.

From April or May 1956 until the early part of 1973, Claimant served as a brakeman and conductor on the "Carbo run." The trains on this run hauled raw coal across a mountain from the mine site to a preparation plant, where the coal was cleaned, washed and graded.

During the trip from the mine site to the preparation plant, Claimant was exposed to coal dust that blew from the loaded cars. When checking the couplings between the cars and performing other duties at the mine site and the preparation plant, Claimant was exposed to coal dust that had been pulverized between rails and wheels and stirred by air hoses and the movement of the workers' feet. "As far as dust exposure, you could blow your nose and it would be like tar, and it looked like real coal dust," Claimant testified. "If you would cough, it looked like real coal dust. So, we were exposed to an awful lot of dust." Relying upon Claimant's credible testimony, I find that he was exposed to coal dust as a result of his employment as a coal transportation worker. If this employment occurred "in or around a coal mine," Claimant falls within the statutory definition of "miner."

The Benefits Review Board has established a three-part test for determining whether a claimant qualifies as a "miner":

> First, claimant must prove that the coal with which he worked was still in the course of being processed, and not yet a finished product in the stream of commerce (status of the coal test). Second, claimant must establish that the worker performer a function integral to the coal production process (*i.e.*, the extraction or preparation of coal), and not one merely ancillary to the de-

> livery and commercial use of processed coal (function test). The status of the coal and the functions performed by the worker are questions of fact to be resolved by the administrative law judge. Third, the work must have occurred in or around a coal mine or coal preparation facility (situs test). A coal mine is an area of land used or intended to be used for the extraction or preparation of coal, including a custom coal preparation facility.

Whisman v. Director, 8 BLR 1-96, 1-97 (1985) (citations omitted). Claimant's letter of February 12, 1980 and his uncontradicted testimony indicate that Claimant primarily worked with raw coal rather than processed coal during his employment on the "Carbo run." Relying upon this evidence, I find that Claimant has satisfied the "status of the coal" test.

In *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975), the United States Court of Appeals for the Fourth Circuit found that a truck driver's delivery of coal from a mine site to a tipple for processing, grading, and loading was part of the extraction and preparation process. Similarly, in *Seltzer v. Director*, 7 BLR 1-912 (1985), the Board found that the haulage of coal from a mine to a "breaker" for washing, crushing and sizing constituted coal mine employment. Likewise, I find in this case that Claimant's transportation of coal from the mine to the preparation plan was integral to the coal production process and therefore satisfies the "function" test. The case law simply does not support Employer's position that the haulage of raw coal is not the work of a "miner."

Employer argues that Claimant did not spend a significant portion of his workday at a coal mine site

or coal preparation facility. *See Bower v. Amigo Smokeless Coal Co.*, 2 BLR 1-729 (1979). The facts do not support this argument. At the coal mine site and preparation plant, Claimant performed duties such as coupling cars, knocking brakes, checking car numbers, classifying cars, and keeping records. According to the letter of February 12, 1980, Claimant sometimes handled 250-300 cars in a day. According to Claimant's testimony, he sometimes "walked" a hundred cars at a time; and then walked back. These duties necessarily occupied a significant portion of time. Relying upon the evidence discussed above, I find that Claimant has satisfied the "situs" test. I further find that Claimant worked "in or around a coal mine" within the statutory definition of "miner." This conclusion is consistent with the *Roberts* decision, in which the court of appeals found that a truck driver who hauled coal from a mine site to a preparation facility "was employed *in* a coal mine." 527 F.2d at 602 (emphasis supplied by court). Citing the broad definition of "coal mine" found at 20 C.F.R. § 410.110(h), the court explained "that the boundaries of the mine extend at least to the point where the coal is processed and loaded for further shipment." *Id.*

Claimant's employment on the "Carbo run" satisfies each of the three parts of the *Whisman* test. Accordingly, I find that Claimant qualifies as a "miner" within the meaning of the Act and the Regulations.

Between 1973 and 1979, Claimant worked as a conductor out of Norton. During this period, Claimant primarily hauled processed coal. The transportation of processed coal in the stream of commerce is not integral to the extraction or preparation process

and therefore does not qualify as coal mine employment.

Dependents

For the purpose of augmentation of benefits, Claimant has one dependent: his wife, Ruby Helen Roberson.

Responsible Operator

Section 725.491(a) of the Regulations defines "operator" as follows:

> In accordance with section 3(d) of the Act [30 U.S.C. § 802(d)], an operator for purposes of this part is "any owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine." In accordance with sections 402(d) and 422(b) of the Act, certain other employers, including those engaged in coal mine construction, maintenance, and transportation, shall also be considered to be operators for purposes of this part. An independent contractor or self-employed miner, construction worker, coal preparation worker, or transportation worker may also be considered a coal miner operator for purpose of this part. *It is Congress' intent that any employer of a miner as defined in § 725.202(a) shall, to the extent appropriate, be considered an operator for the purposes of this part, and the provisions of this part shall be construed in accordance with this intent.*

(Emphasis added.) The last sentence of Section 725.491(a) supports the position advanced by the Director, who argues that Norfolk and Western is "the

responsible operator in this case because it is the employer of a miner as defined in the Act."

In *Louisville and Nashville Railroad Company et al. v. Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981), the United States District Court for the Western District of Kentucky, without distinguishing the transporation of raw coal to a preparation plant from the transportation of processed coal within the stream of commerce, held that railroads are not "operators." The court enjoined the Department of Labor from applying the Federal Coal Mine Health and Safety Act, as amended by the Black Lung Benefits Act of 1972 and the Black Lung Benefits Reform Act of 1977, to railroads. "A railroad obviously does not extract coal," the court reasoned, "nor does the work done by a railroad in connection with transporting coal fall within the definition of 'work of preparing the coal' set forth in 30 U.S.C. § 802(i)."

That reasoning does not accord with the decision of the United States Court of Appeals for the Fourth Circuit which found that the transportation of raw coal to a preparation facility was part of the preparation process. *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975); *see also Whisman v. Director*, 8 BLR 1-96 (1985); *Seltzer v. Director*, 7 MLR 1-912 (1985). This case having originated in the Fourth Circuit, I place no weight upon the district court's opinion.

The regulatory definition of "operator" includes "any independent contractor performing services . . . at [a] mine." 20 C.F.R. § 725.491(a). In *Itell v. Ritchey Trucking Company*, 8 BLR 1-356 (1985), the Benefits Review Board held that a lessor of heavy equipment, having a continuing presence at a mine site and providing essential mine services, was an

"operator" within the meaning of the Act. Likewise, I find that Norfolk and Western, having a continuing presence at the mine site and providing services essential to the preparation of the coal, is an "operator." This conclusion is consistent with Section 725.491(a) of the Regulations, which advises that "any employer of a miner as defined in § 725.202(a) shall, to the extent appropriate, be considered an operator . . . ." *See also* 20 C.F.R. § 725.491(c)(1).

An operator is not the "responsible operator" unless it satisfies the requirements of Section 725.492 of the Regulations. The evidence indicates that Employer satisfies these requirements. Accordingly, I find that Employer properly has been designated as the "responsible operator" in this case.

Length of Coal Mine Employment

As discussed *supra*, all of Claimant's coal mine employment occurred from 1956 to 1973 during Claimant's tenure as a brakeman and conductor on the "Carbo run." During this period, Claimant occasionally served on other "runs." Claimant estimated that he worked on the "Carbo run" for a total of 14 years during this period. Claimant's testimony is credible and uncontradicted. Relying upon Claimant's testimony, I find that Claimant accumulated 14 years of coal mine employment.

Applicable Part of the Regulations

Claimant filed an application for benefits with the Department of Labor on February 27, 1978, prior to the effective date of Part 718 of the Regulations. Claimant having accumulated more than 10 years of coal mine employment, I will consider this case under Part 727. To secure benefits, Claimant must estab-

lish that he is totally disabled due to pneumoconiosis arising out of coal mine employment.

The Interim Presumption

Section 727.203(a) of the Regulations provides that a living miner with more than 10 years of coal mine employment is presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment if the evidence satisfies any one of the requirements set forth in subsections (1) through (4). In *Stapleton v. Westmoreland Coal Company*, 785 F.2d 424 (4th Cir. 1986), the United States Court of Appeals for the Fourth Circuit held that a single qualifying ventilatory study is sufficient to trigger the interim presumption under Subsection 727.203 (a)2). Applying *Stapleton*, I find that the qualifying, conforming ventilatory study of July 2, 1985 triggers the interim presumption.

Rebuttal

Section 727.203(b) of the Regulations provides four means of rebutting the interim presumption. In determining whether rebuttal has been established, all relevant medical evidence must be considered.

Under Subsection 727.202(b)(1), the presumption is rebutted if the evidence establishes that the miner is doing his usual coal mine work or comparable and gainful work. Because Claimant has not worked at any job since his retirement in 1979, the interim presumption is not rebutted under Subsection 727.203(b)(1).

Under Subsection 727.203(b)(2), the presumption is rebutted if the evidence establishes that the miner is able to do his usual coal mine work or comparable and gainful work. The Benefits Review Board has held that an employer may establish rebuttal under

this subsection by demonstrating that the claimant does not suffer from a totally disabling respiratory impairment. *Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134 (1984).

No physician offered an opinion that Claimant does not suffer from a totally disabling respiratory impairment. Indeed, Dr. Joseph F. Smiddy and Dr. John G. Byers, Jr., specifically diagnosed such a condition. The qualifying results of all of this ventilatory studies of record support these opinions. On the basis of this evidence, I find that the interim presumption is not rebutted under Subsection 727.203 (b)(2).

Under Subsection 727.203(b)(3), the presumption is rebutted if the evidence establishes that the disability of the miner did not arise in whole or in part out of coal mine employment. Under Subsection 727.203(b)(4), the presumption is rebutted if the evidence establishes that the miner does not have pneumoconiosis. The X-ray evidence of record, in conjunction with the medical opinions of record, is relevant to rebuttal under both of these subsections. The record contains the following X-ray evidence:

Date of X-ray	Reader	Qualifications [1]	Interpretation
1/24/79	H.L. Bassham	Board-certified radiologist	0/0

[1] Where the physicians' qualifications are not in evidence, I have taken official notice of their qualifications by reference to the following sources: an official listing provided by the U.S. Department of Health and Human Services; *Marquis Who's Who Directory of Medical Specialists*, published under the direction of the American Board of Medical Specialties; and the 30th edition of the *American Medical Directory*, published under the direction of the American Medical Association.

Date of X-ray	Reader	Qualifications	Interpretation
	E.D. Aycoth	Board-eligible radiologist and B-reader	1/1 p, p
11/1/79	J.G. Byers Jr.	Pulmonary specialist; Board-certified in internal medicine	0/0
8/24/84	S.N. Fisher	Board-certified radiologist and B-reader	1/1 p, p
	E.D. Aycoth	Board-eligible radiologist and B-reader	1/0 p, q
	M.A. Bassali	Board-certified radiologist and B-reader	1/0 p, s
	W.S. Cole	Board-certified radiologist and B-reader	0/0
	P.S. Wheeler	Board-certified radiologist and B-reader	moderate emphysema no pneumoconiosis
7/2/85	L.H. Westerfield	Radiologist	Mild COPD and emphysema; no pneumoconiosis

In addition to this X-ray evidence, the record contains relevant medical opinions submitted by Dr. Smiddy, Dr. Byers, and Dr. Richard S. Buddington.

Dr. Buddington and Dr. Byers both examined Claimant in 1979. Relying upon Dr. Bassham's 0/0 interpretation of the January 1979 X-ray, Dr. Buddington concluded that Claimant's "primary pulmonary disorder is probably large and small airway obstruction." Relying upon his own interpretation of the November 1979 X-ray and Claimant's history of smoking (one pack per day for 10-15 years before quitting in the early 1960's), Dr. Byers concluded

that Claimant suffered from emphysema, chronic bronchitis and "an element of reversible obstructive airway disease" that "could have been caused by chronic tobacco abuse or by some granulomatous disease of the lung resulting in pulmonary calcifications." In Dr. Byers' opinion, coal dust exposure did not cause Claimant's pulmonary disease.

Both physicians relied upon X-ray evidence. Neither physician had an opportunity to consider the most recent X-rays of August 1984 and July 1985. Because pneumoconiosis is a progressive disease, these two X-rays are the most probative as to the existence of pneumoconiosis. Of the six interpretations of record of these two X-rays, five were rendered by B-readers who also were Board-certified or Board-eligible radiologists. Of these five readers, three diagnosed pneumoconiosis. In light of these circumstances, I find that the opinions of Drs. Buddington and Byers are insufficient to rebut the interim presumption under Subsections 727.203(b)(3) or 727.203(b)(4). I rely upon the following considerations: (1) Drs. Buddington and Byers based their opinions upon X-ray evidence without having had an opportunity to consider the most probative X-ray evidence of record; and (2) the positive readings rendered by Drs. Fisher, Aycoth, and Bassali of the August 1984 X-ray suggest that Claimant's condition changed subsequent to Dr. Buddington's and Dr. Byers' examinations. My conclusion is not affected by the negative opinions readings of the August 1984 X-ray offered by Drs. Cole and Wheeler, whose qualifications are equal to those of Drs. Fisher and Bassali. Applying the "true doubt" rule, I must resolve these conflicting X-ray interpretations in favor of Claimant. My conclusions also is not affected by the negative reading of the July 1985 X-ray offered

by Dr. Westerfield, whose qualifications are inferior to those of Drs. Fisher, Aycoth and Bassali. Moreover, my conclusion is supported by 1985 opinion of Dr. Smiddy, who concluded that Claimant suffered from a "severe respiratory impairment with total disability related to a combination of severe chronic obstructive pulmonary disease and an element of significant coal dust exposure." Dr. Smiddy having examined Claimant significantly later than Drs. Buddington and Byers, I find that Dr. Smiddy's opinion warrants greater weight than the opinions of the other physicians.

For the reasons discussed above, I find that the medical opinions of Drs. Buddington and Byers in conjunction with the negative X-ray interpretations of Drs. Cole, Wheeler and Westerfield, in light of the contradictory opinions and readings of Drs. Smiddy, Fisher, Aycoth, and Bassali, are insufficient to rebut the interim presumption under Subsections 727.203 (b) (3) or 727.203 (b) (4).

Entitlement

Employer has failed to rebut the interim presumption. Accordingly, I find that Claimant is entitled to benefits under the Act as augmented by reason of his dependent sponse.

The evidence does not establish a date of onset of total disability. For this reason, benefits are payable from the beginning of the month when the claim was filed or the month when review was elected under Part 727 of the Regulations. 20 C.F.R. § 725,503 (b). Unless the miner suffers from complicated pnenmoconiosis, however, no benefits are payable for any period during which the miner engaged in coal mine work or comparable and gainful work. 20 C.F.R. § 725.503A.

Claimant filed his application for benefits in February 1978. He did not retire until October 1979. In the interim, Claimant served as a conductor out of Norton. Claimant's description of his duties during this period indicates that his work was substantially similar to his coal mining work. Claimant simply hauled a different product: processed coal rather than raw coal. Because Claimant engaged in "comparable and gainful work" until October 1979, he is entitled to benefits commencing as of the beginning of that month.

Based upon the forgoing findings of fact and conclusions of law, and upon the entire record, I hereby make and enter the following order.

ORDER

Employer, Norfolk and Western Railway Company, is ordered to provide for payment to Claimant, Olen R. Roberson, of all benefits to which he is entitled under the Act, as augmented by reason of his dependent sponse, commencing as of October 1, 1979.

Administrative Law Judge

/s/ Lawrence E. Gray
LAWRENCE E. GRAY

Dated: Dec. 30, 1986
Washington, D.C.

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036 (20 C.F.R. § 725.481).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20486

Supreme Court, U.S.
FILED
APR 19 1991
OFFICE OF THE CLERK

No. 90-1271

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

OLEN ROBERSON and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

ROBERT W. BLANCHETTE
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2500

RALPH J. MOORE, JR.*
JOHN TOWNSEND RICH
ALOK AHUJA
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for the Association of American Railroads

* Counsel of Record

April 19, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Are the railroad industry and railroad workers—for whom Congress has provided a separate statutory scheme of benefits for occupational injury and disease—covered by the Black Lung Benefits Act, 30 U.S.C. §§ 901-945?

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
Applying the Black Lung Benefits Act to Railroad Workers Subjects the Railroad Industry to Burdensome and Potentially Duplicative Claims by Workers Already Protected by a Separate Federal Statutory Scheme, in the Face of Unmistakable Evidence That Congress Intended That the Act Would Not Apply to Railroad Workers.	4
A. The Language of the Statute Does Not Clearly Include Railroad Workers.	6
B. The Legislative History Shows Explicitly That Railroads Were Not To Be Covered.	8
C. The Fourth Circuit's Insupportable Reading of the Statute Will Have Far-Reaching Consequences for the Railroad Industry.	15
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Allen v. *State Bd. of Elections*, 393 U.S. 544 (1969) 8
Berger v. *Heckler*, 771 F.2d 1556 (2d Cir. 1985) 15
Boston & Maine R.R. v. *Armburg*, 285 U.S. 234 (1932) 4
California Fed. Sav. & Loan Ass'n v. *Guerra*, 479 U.S. 272 (1987) 16
Caminetti v. *United States*, 242 U.S. 470 (1917) 14
Cass v. *United States*, 417 U.S. 72 (1974) 8
Chevron, U.S.A., Inc. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984) 14
Church of the Holy Trinity v. *United States*, 143 U.S. 457 (1892) 16
Director, OWCP v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977) 5
Eldridge v. *Interstate R.R.*, No. 88-BLA-1870 (Dep't Labor ALJ Decision & Order Awarding Benefits Mar. 27, 1990), *appeal docketed*, No. 90-1356 (Benefits Rev. Bd. Apr. 26, 1990) 18
Eplion v. *Director, OWCP*, 794 F.2d 935 (4th Cir. 1986) 18
Fox v. *Director, OWCP*, 889 F.2d 1037 (11th Cir. 1989) 11
Garcia v. *United States*, 469 U.S. 70 (1984) 14
Hanna v. *Director, OWCP*, 860 F.2d 88 (3d Cir. 1988) 17
Heppner v. *Alyeska Pipeline Service Co.*, 665 F.2d 868 (9th Cir. 1981) 15
In re George Rodman, Inc., 792 F.2d 125 (10th Cir. 1986) 14
Independent U.S. Tanker Owners Comm. v. *Skinner*, 884 F.2d 587 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1922 (1990) 14
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 14
Japan Whaling Ass'n v. *American Cetacean Soc'y*, 478 U.S. 221 (1986) 14
Louisville & Nashville R.R. v. *Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981), *vacated*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) 2, 3

TABLE OF AUTHORITIES—Continued

Page

Miller v. *Federal Mine Safety & Health Review Comm'n*, 687 F.2d 194 (7th Cir. 1982) 16
Mitchell v. *Director, OWCP*, 855 F.2d 485 (7th Cir. 1988) 17
Monterey Coal Co. v. *Federal Mine Safety & Health Review Comm'n*, 743 F.2d 589 (7th Cir. 1984) 15
New York C. R.R. v. *Winfield*, 244 U.S. 147 (1917) 4
Paskel v. *Heckler*, 768 F.2d 540 (3d Cir. 1985) 15
Pittston Coal Group v. *Sebben*, 488 U.S. 105 (1988) 13
Public Citizen v. *United States Dep't of Justice*, 491 U.S. 440 (1989) 16
Rod Warren Ink v. *Commissioner*, 912 F.2d 325 (9th Cir. 1990) 15
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) .. 5
Schoener v. *Consolidated Rail Corp.*, No. 88-BLA-02125 (Dep't Labor ALJ Decision & Order Awarding Benefits Oct. 26, 1990), *appeal docketed*, No. 91-347 (Benefits Rev. Bd. Nov. 13, 1990) 18
Solis-Ramirez v. *United States Dep't of Justice*, 758 F.2d 1426 (11th Cir. 1985) 14
South Buffalo Ry. v. *Ahern*, 344 U.S. 367 (1953) .. 4
Steelworkers v. *Weber*, 443 U.S. 193 (1979) 16
Train v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976) 16
United States v. *James*, 478 U.S. 597 (1986) 15
United States v. *Meyer*, 808 F.2d 912 (1st Cir. 1987) 14
United States v. *South Half of Lot 7*, 910 F.2d 488 (8th Cir. 1990) (en banc), *cert. denied*, 59 U.S. L.W. 3652 (U.S. Mar. 25, 1991) (No. 90-1069) .. 15
United States v. *Stauffer Chem. Co.*, 684 F.2d 1174 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984) 16
United States v. *Wilson*, 916 F.2d 1115 (6th Cir. 1990) 14

TABLE OF AUTHORITIES—Continued

	Page
Urie v. *Thompson*, 337 U.S. 163 (1949)	4, 5
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)	13
Watt v. *Alaska*, 451 U.S. 259 (1981)	16
West v. *Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985)	15
STATUTES:	
Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988)	*passim*
30 U.S.C. § 902(d)	*passim*
30 U.S.C. § 931	13
30 U.S.C. § 932(a)	5
30 U.S.C. § 932(b)	11, 12, 13
30 U.S.C. § 932(g)	5
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978)	2, 12
Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (1988)	4, 5, 7, 13
Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.* (1988)	12
30 U.S.C. § 802(d)	11, 12
30 U.S.C. § 802(h)(2)	7
Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (1977)	12
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (1988)	5
33 U.S.C. § 904	5
33 U.S.C. § 905(a)	5
Railroad Retirement Act, 45 U.S.C. §§ 231-231u (1988)	4, 13
45 U.S.C. § 231(b)(2)	14
Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-369 (1988)	4, 13
45 U.S.C. § 351(d)	14

TABLE OF AUTHORITIES—Continued

REGULATIONS: Page

20 C.F.R. § 725.490(b) (1990) 11

LEGISLATIVE MATERIALS:

121 Cong. Rec. 29,880 (1975) 9
122 Cong. Rec. 4994 (1976) 9
123 Cong. Rec. 23,160-61 (1977) 12
123 Cong. Rec. 24,239 (1977) 9
124 Cong. Rec. 3432 (1978) 13
Black Lung Benefits Reform Act, 1976: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. (1976) 9
H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 308 10
H.R. 1532, 95th Cong., 1st Sess. § 2(b) (1977) 9
H.R. 3333, 94th Cong., 1st Sess. § 3 (1975) 9
H.R. 4389, 95th Cong., 1st Sess. § 2(b) (1977) 9
House Comm. on Education & Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977 ("Black Lung Legis. Hist.") (Comm. Print 1979) .....*passim*
S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 9, 10
S. Rep. No. 1254, 94th Cong., 2d Sess. (1976) 9

OTHER AUTHORITIES:

Annot., *Liability, Under Federal Employers' Liability Act (45 U.S.C. §§ 51 et seq.) For Industrial or Occupational Disease or Poisoning*, 30 A.L.R.3d 735 (1970 & Supp. 1990) 4
Association of American Railroads, Railroad Facts 29 (1990) 2
4 A. Larson, *Workmen's Compensation* § 91.10 (1990) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1271

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

OLEN ROBERSON and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT

The Association of American Railroads ("AAR") is the principal trade association of the nation's railroads. Its members operate approximately 85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all

railroads in the United States. AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern. It filed briefs as *amicus curiae* before the administrative agency and the court of appeals in this case.

The issue presented by the petition for writ of certiorari is whether Congress intended that common carriers by rail and their employees be covered by the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-945 (1988). Various members of AAR have been and are involved in hauling coal from hundreds of mines or other coal facilities. Coal is the largest category of freight moved by Class I railroads (39.3 percent of freight tonnage in 1989) and the largest contributor to the revenues of those railroads (22.4 percent in 1989).[1] If the decision of the Fourth Circuit in this case is allowed to stand, those member railroads may be found liable for the payment of black lung benefits to potentially thousands of railroad employees who have spent some portion of their working lives involved in coal movements, even though those employees have other, congressionally mandated avenues of relief.

The railroad industry has long been concerned about this issue, which first arose after enactment of the Black Lung Benefits Reform Act of 1977. Shortly thereafter, fifteen railroads sued and obtained declaratory and injunctive relief in the Western District of Kentucky, prohibiting the Secretary of Labor from applying the Act to railroad employees or to railroads. *Louisville & Nashville R.R.* v. *Donovan*, No. 80-0611-L(G) (W.D. Ky. 1981) (Pet. App. 11a). On appeal, the Sixth Circuit vacated the decision below on the ground that the district court lacked subject matter jurisdiction, because Congress had specifically provided a statutory scheme in which claims must first be decided administratively and then reviewed in the courts

---

[1] Association of American Railroads, Railroad Facts 29 (1990).

of appeals. 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

AAR is filing this brief to emphasize the importance of this case to the railroad industry and to support petitioner's demonstration that the Fourth Circuit erroneously rejected unmistakable evidence that Congress never intended to bring railroad workers or common carriers by rail within the coverage of the BLBA. That conclusion is fully consistent with, if not compelled by, the statutory language and is explicitly confirmed in the legislative history. The Fourth Circuit's decision to include railroad workers, based on the supposed "plain meaning" of statutory language that, if anything, points the other way, is symptomatic of an approach to statutory construction that demands correction by this Court. Moreover, the decision creates an unworkable and open-ended standard that threatens to subject the railroad industry to thousands of black lung claims, contrary to all indicia of congressional intent. This dismissal of clear congressional intent on the scope of an important benefit statutes—by a short-handed division of the court of appeals[2]—deserves review by this Court.[3]

---

[2] Judge Wilkinson was a member of the panel that heard oral argument in the case but later recused himself. Pet. App. 1a. He was not replaced.

[3] Counsel for the parties have furnished written consents to the AAR's filing this brief as *amicus curiae*, and copies of those letters have been filed with the Clerk.

ARGUMENT

Applying the Black Lung Benefits Act to Railroad Workers Subjects the Railroad Industry to Burdensome and Potentially Duplicative Claims by Workers Already Protected by a Separate Federal Statutory Scheme, in the Face of Unmistakable Evidence That Congress Intended That the Act Would Not Apply to Railroad Workers.

Coal is the largest category of freight moved by Class I railroads and the largest contributor to the revenues of those railroads. Thousands of railroad workers are involved in the movement of coal, and thus may have some exposure to coal dust. Those workers are already covered by the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, which preempts state workers' compensation laws [4] and establishes a comprehensive scheme for compensation of workers for work-related injuries and occupational disease, without any statutory ceiling on liability. It is undisputed that black lung disease is covered by the FELA.[5] Railroad workers are also covered by two other federal statutes that provide benefits for sickness or disability: the Railroad Retirement Act, 45 U.S.C. §§ 231-231u, and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-369.

If, as a result of the Fourth Circuit decision, significant numbers of railroad workers exposed to coal dust are found to have valid claims under the BLBA—an Act designed for the special benefit of coal mine workers—a substantial financial burden will be imposed on the railroad industry.

---

[4] *South Buffalo Ry.* v. *Ahern*, 344 U.S. 367, 371 (1953); *Boston & Maine R.R.* v. *Armburg*, 285 U.S. 234, 238-239 (1932); *New York C. R.R.* v. *Winfield*, 244 U.S. 147, 148-54 (1917).

[5] See, *e.g.*, *Urie* v. *Thompson*, 337 U.S. 163, 180-87 (1949) (silicosis allegedly resulting from inhalation of dust particles during railroad employment actionable under FELA); Annot., *Liability, Under Federal Employers' Liability Act (45 U.S.C. §§ 51 et seq.) For Industrial or Occupational Disease or Poisoning*, 30 A.L.R.3d 735 (1970 & Supp. 1990).

Moreover, because the BLBA does not clearly provide that remedies under the Act are exclusive[6] or that benefits should be reduced by amounts payable under the FELA and the other railroad benefits statutes,[7] years of litigation may be necessary to establish whether the railroads can be subjected to duplicative proceedings and remedies under the BLBA and those railroad-specific statutes. The burdens of such claims and of such potentially duplicative proceedings would be unavoidable had Congress intended to impose them, but it did not.

The Fourth Circuit ruled that the railroad worker in this case—who was exposed to coal dust in the course of his regular railroad employment in connection with the railroad's movement of raw coal from a mine site to a distant preparation plant—was entitled to benefits under the BLBA because he came within the supposedly "plain language" of the statutory definition of a "miner" in 30

---

[6] The BLBA, in 30 U.S.C. § 932(a), incorporates by reference 33 U.S.C. § 905(a), a provision of the Longshore and Harbor Workers' Compensation Act which provides that "[t]he liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee." But 33 U.S.C. § 904 is *not* incorporated into the BLBA. Thus, it is unclear whether the BLBA in fact affords the exclusive remedy for occupational disease compensable under the Act. See *Director, OWCP* v. *Peabody Coal Co.*, 554 F.2d 310, 320-21 & n.14 (7th Cir. 1977) (observing, in *dictum*, that "Congress appears to be saying that employers are entitled to the exclusivity benefit" when the BLBA applies, but noting that this conclusion is not free from doubt).

[7] The BLBA provides that "the amount of benefits payable under [the Act] shall be reduced * * * by the amount of any compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis." 30 U.S.C. § 932(g). But this Court has observed in other contexts that the FELA is not a workmen's compensation law. *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 509 (1957); *Urie* v. *Thompson*, 337 U.S. 163, 183 (1949). See also 4 A. Larson, *Workmen's Compensation* § 91.10, at 16-528 (1990).

U.S.C. § 902(d). Pet. App. 6a. Accordingly, it found "no need to resort to the Act's legislative history." Pet. App. 7a. However, the statutory language does not plainly cover the railroad industry, the legislative history expressly excludes that industry, and the Fourth Circuit's extraordinary reading of the statutory language creates the potential for thousands of black lung claims by railroad workers and years of litigation to settle the scope of the Fourth Circuit's analysis.

A. The Language of the Statute Does Not Clearly Include Railroad Workers.

Only persons who qualify as "miners" as defined in 30 U.S.C. § 902(d) are entitled to benefits under the BLBA. The first sentence of this statutory definition states that the term "miner" means

> "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal."

The second sentence states:

> "Such term *also* includes an individual *who works or has worked in* coal mine construction or *transportation in or around a coal mine*, to the extent such individual was exposed to coal dust as a result of such employment." *Id.* (emphasis added).

The natural reading of this provision is that transportation workers must meet the test of the second sentence —that they work in "transportation in or around a coal mine" and that they be exposed to coal dust as a result of such employment. Workers transporting coal are not, in the usual sense, "working * * * in the extraction or preparation of coal," as the first sentence requires. Moreover, the express reference to transportation workers in the second sentence of the definition makes that sentence the natural and exclusive source of the test for coverage of those workers.

On this straightforward reading of the statute, railroad workers are not covered. Railroad workers such as Roberson do not transport coal "in or around a coal mine" or "in and around" a coal preparation facility.[8] They are engaged, for a common carrier, in transporting coal *away* from coal mines to other sites—either to distant preparation plants, as here, or to plants where processed coal will be consumed. The "transportation [of coal] in or around a coal mine," naturally read, refers to transportation from the actual point of extraction to the point at which the coal is ultimately loaded for transportation away from the mine site, and to other transportation from point to point at the mine or preparation facility property. It is these latter transportation functions, which would normally be performed by employees of the mining company or independent contractors hired for such purposes, and not by common carriers by rail, that come naturally within the term "transportation [of coal] *in or around* a coal mine."

This reading squares congressional intent with the problem being addressed, because non-railroad coal transportation workers do not have another federal remedy. Railroad workers, by contrast, have been protected by another federal law—the FELA—since 1908. Exclusion of railroad workers avoids potential conflicts between two federal remedial regimes.

The Fourth Circuit did not even address this natural reading of the statute. Utterly without explanation, the court read the provision to require the inclusion of transportation workers "who were involved 'in the extraction or preparation of coal'" (what it termed the "function test") and "who worked 'in or around a coal mine'" (what it termed the "situs test"). Pet. App. 5a. This reading unnaturally subjects transportation workers to a

---

[8] A coal preparation facility, as well as the actual mine site, satisfies the statutory definition of "coal mine." 30 U.S.C. § 802(h)(2).

test derived from the *first* sentence of the definition. Even on that reading of the statute, the "plain words" do not point to coverage of railroad workers. Railroad workers like Roberson are no more "working in the preparation of coal" than they would be "working in the manufacture of automobiles" if they moved automobile engines by rail from Pontiac to Detroit. The Fourth Circuit's sole justification for concluding that this language covers railroad workers is to say: "Transporting raw coal to a preparation plant *plainly* is part of the preparation of coal." Pet. App. 6a (emphasis added). There is nothing "plain" about that conclusion. It is based on an unnatural reading of the statutory language, and it certainly is not compelled by that language.

In short, the statutory language on which the Fourth Circuit relied does not point naturally to the conclusion that Congress intended to bring employees of common carriers by rail under the coverage of the statute, and the Fourth Circuit's decision that the language compels this conclusion is extraordinary and insupportable. Where, as here, there is clearly "room for reasonable dispute over the construction of [the statute] based on the statutory language alone," [9] and the text "does not make crystal clear its intended scope," [10] a court's obligation to effectuate the congressional purpose demands attention to explicit legislative history that resolves any doubt about BLBA coverage of the railroad industry.

B. The Legislative History Shows Explicitly That Railroads Were Not To Be Covered.

The legislative history of the definition of "miner" shows unmistakably that railroad workers were not to be covered by the BLBA. First, the Senate Report on its version of the definition of "miner" expressly stated that

---

[9] *Cass* v. *United States*, 417 U.S. 72, 77 n.5 (1974).

[10] *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 570 (1969).

"workers employed by a railroad, trucking company, or barge line" are "*beyond the scope of this legislation*" unless the company they work for "operates a mine." S. Rep. No. 209, 95th Cong., 1st Sess. 20-21 (1977) (emphasis added.[11] Second, Senator Jennings Randolph, the floor manager of the 1977 black lung legislation, repeated this understanding in his remarks introducing the bill on the Senate floor. 123 Cong. Rec. 24,239 (1977) ("Railroad, trucking, bargeline, and coke oven workers are not included in the definition."). The force of these explicit remarks is confirmed by the utter absence in the hearings, debates, or other reports of any suggestion that coverage would extend to employees of common carriers by rail, a fact never discussed by the Fourth Circuit.[12]

---

[11] Reprinted in House Comm. on Education & Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977 ("Black Lung Legis. Hist.") 623-24 (Comm. Print 1979).

[12] The legislative history contains several discussions of the need to extend the coverage of the Act to "outside men"—mine employees who worked above ground in various functions, such as loading, sizing, or washing the coal, transporting the coal in coal cars from the actual extraction site to the point of loading for transportation away from the mine, or loading the coal into waiting railroad cars. Nowhere in these discussions or in the texts of the bills proposed to accomplish this expansion of coverage is there any suggestion that coverage would extend to the employees of common carriers by rail. See 122 Cong. Rec. 4994 (1976) (statement of Rep. Hayes); 121 Cong. Rec. 29,880 (1975) (statement of Rep. Roncalio); S. Rep. No. 1254, 94th Cong., 2d Sess. 17 (1976), reprinted in Black Lung Legis. Hist. 352; *Black Lung Benefits Reform Act, 1976: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 89 (1976) (statement of Rep. Simon); *id.* at 180 (statement of Rep. Hayes); *id.* at 103, 150, 153, 159 (remarks of miners' representatives); H.R. 1532, 95th Cong., 1st Sess. § 2(b) (1977), reprinted in Black Lung Legis. Hist. 409, 410; H.R. 4389, 95th Cong., 1st Sess. § 2(b) (1977), reprinted in Black Lung Legis. Hist. 437, 438; H.R. 3333, 94th Cong., 1st Sess. § 3 (1975), reprinted in Black Lung Legis. Hist. 54, 56.

In a brief reference in a footnote (Pet. App. 7a n.3), the Fourth Circuit rejected this unambiguous legislative history on the ground that the Senate bill "did not prevail, and the subsequent Conference Committee Report contains no language excluding railroad workers or any other specific set of transportation workers from the definition of miner." But the conference version *narrowed* the apparent coverage of transportation workers by taking them out of the broadly-worded first sentence of the Senate's definition and adding them to the differently-worded second sentence.[13] Moreover, the Conference Report stated that the conference substitute "*conforms generally* to the Senate amendment with an amendment to *clarify* that transportation and construction workers are covered *only to the extent* they work in or around a coal mine and are exposed to coal dust." H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 15 (1978) (emphasis added), reprinted in 1978 U.S. Code Cong. & Admin. News 308, 309. It is not surprising that the Conference Committee report did not repeat the express statement about railroad workers in the Senate Report, because the revised statutory language did not lend itself so easily to misunderstanding as the Senate's version. In any event, it defies belief that the Conference Committee would have described its version of the bill as "conforming generally to" and "clarifying" the Senate version had it disagreed on a major point—namely, the Senate Committee's express disavowal of any intention to include railroad

---

[13] The Senate bill defined "miner" to mean

> "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, *or transportation* of coal. Such term also includes an individual who works or has worked in coal mine construction during any period such individual was exposed to coal dust in his or her employment."

S. Rep. No. 209, 95th Cong., 1st Sess. 34 (1977) (emphasis added), reprinted in Black Lung Legis. Hist. 637. See Petition at 13.

workers. Had the Conference Committee intended a clear change from the Senate version by including railroad workers within the scope of the Act, it surely would not have been silent on this matter.[14]

Thus the Fourth Circuit erroneously dismissed express legislative history on the statutory definition of a "miner" that admits of only one conclusion: railroad workers are not "miners" entitled to benefits under the BLBA.

Moreover, the legislative history of the provisions under which railroads would be required to pay benefits as "responsible operators" if their workers were covered by the Act confirms that Congress did not intend the railroad industry and its employees to be covered by the BLBA.[15] The Federal Mine Safety and Health Act, of which the BLBA is a part, defines "operator" for purposes of the BLBA and was amended in 1977 to include "any independent contractor performing services * * * at [a] mine." 30 U.S.C. § 802(d).[16] But the House man-

---

[14] As the Petition demonstrates (Pet. 16-17), the Fourth Circuit's rejection of the Senate Report is in direct conflict with the Eleventh Circuit's decision in *Fox* v. *Director, OWCP*, 889 F.2d 1037, 1040-41 (11th Cir. 1989) (rejecting BLBA coverage of a claimant who worked at a coke oven, which purchased raw coal for processing into coke). The Senate Report lists "coke oven workers" as well as railroad workers as "beyond the scope of this legislation," and the Eleventh Circuit relied on the Senate Report as providing a definitive list of workers excluded from BLBA coverage.

[15] The BLBA liability provision, amended in 1978 at the same time that the definition of "miner" was amended, makes any "operator of a coal mine" and any "employer, other than an operator of a coal mine" liable for payment of benefits to covered "miners." 30 U.S.C. § 932(b). The regulations refer to such persons as "responsible operators." 20 C.F.R. § 725.490(b) (1990).

[16] 30 U.S.C. § 802(d) provides in its entirety that, for the purpose of "this chapter" (which includes the BLBA), the term

> " 'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

[Continued]

ager of the 1977 mine safety amendment explicitly denied that rail transportation of extracted minerals would be subject to the Federal Mine Safety and Health Act. 123 Cong. Rec. 23,160-61 (1977) (colloquy between Representatives Patten and Gaydos). There is nothing in the legislative history of either the Federal Mine Safety and Health Act in general or the BLBA in particular to support the Fourth Circuit's conclusion that common carriers by rail were meant to be covered, notwithstanding the separate remedial scheme Congress had established for the benefit of railroad employees.[17]

---

[16] [Continued]
The words, "independent contractor performing services * * * at [a] mine," do not naturally include railroads, because the work that railroads perform is not the kind that an "operator" might elect to perform itself or to delegate to a surrogate, and thus common carriers are not, as a matter of ordinary usage, "independent contractors" performing services at their customers' worksites.

[17] The legislative history of the BLBA liability provision, 30 U.S.C. § 932(b), contains an express passage showing that the reference in that provision to the liability of an "employer, other than an operator of a coal mine" was not intended to reach beyond companies that are "operators" within the meaning of 30 U.S.C. § 802(d). See the following colloquy between Representative Erlenborn and Representative Perkins (the floor manager of the Black Lung Benefits Reform Act of 1977) during consideration of the conference report on the bill that became law:

> "MR. ERLENBORN. * * * When the Federal Mine Safety and Health Amendments Act of 1977 was enacted as Public Law 95-164 on November 9, 1977, the definition of 'operator' under [30 U.S.C. § 802(d)] was amended to include 'or any independent contractor performing services or construction at such mine.' Section 7(b) of the [black lung] conference report amends section 422(b) of the act [30 U.S.C. § 932(b)] in the terms 'An employer, other than an operator of a coal mine shall not be required to secure the payment of such benefits * * *' and goes on to require such 'employer' to guarantee or secure payment of benefits where a claim is once approved. *Does section 7(b) of the [black lung] conference bill have reference to those transportation or construction employers, now 'operators' under [30 U.S.C. § 802(d) as amended]?*

In short, the legislative history of all the operative provisions of the BLBA and the mine safety act confirms that the railroad industry was simply "beyond the scope" of congressional concern at that time, as the Senate Report stated. Nor is it surprising that congressional concern was so limited. Congress enacted the BLBA because it felt that state workers' compensation laws were not providing adequate remedies for affected mine workers. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 8 (1976). The BLBA was intended to supplement the state workers' compensation systems until the Secretary of Labor certified that a particular state's workers' compensation laws were adequate for black lung claims, at which time federal supervision of black lung claims administration would cease and claims would be handled under the state's workers' compensation machinery. 30 U.S.C. §§ 931, 932(b); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 109-10 (1988).

Railroads and railroad workers, on the other hand, are not subject to the state workers' compensation system. Instead, Congress had already established a separate system for railroad employees' occupational illnesses and injuries in the FELA, the Railroad Retirement Act, and the Railroad Unemployment Insurance Act—a system that displaces state workers' compensation laws (see cases cited *supra* note 4). The latter two statutes exclude from coverage precisely those persons who constitute "miners" under a proper construction of the BLBA.[18] If Congress had intended to accommodate within the framework of

---

"MR. PERKINS. The gentleman is correct in that *the reference is to those transportation or construction employers now designated as operators.*" 124 Cong. Rec. 3432 (1978) (emphasis added).

[18] The Railroad Retirement Act's definition of an "employee" provides that

> "The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad loco-

the BLBA workers already covered for work-related injuries and illnesses under these railroad-specific statutes, it is inconceivable that it would not have discussed the adequacy of these other federal statutory remedies and expressly considered methods of coordinating them with the BLBA.

In sum, that Congress did not intend the BLBA to cover the railroad industry is demonstrated not just by the references to the railroad industry in specific reports and debates, but by the entire context and by the nature of the specific, non-railroad problem that Congress was addressing.[19]

The Fourth Circuit's rejection of this clear legislative history because of supposedly plain statutory language is symptomatic of wide-spread differences of opinion among the circuits on the appropriate attention owed to legislative history. Some other circuit decisions have similarly invoked the so-called "plain meaning" rule as a justification for disregarding legislative history, relying on isolated statements from this Court's opinions.[20]

---

motives) of coal not beyond the mine tipple, or the loading of coal at the tipple." 45 U.S.C. § 231(b)(2).

The Railroad Unemployment Insurance Act has a parallel provision. See 45 U.S.C. § 351(d).

[19] Because the intent of Congress is clearly expressed in the legislative history, this Court's decision in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), does not counsel deference to the administrative agency's interpretation of the statute. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-49 (1987); *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221 233-34 (1986).

[20] See, *e.g.*, *United States* v. *Wilson*, 916 F.2d 1115, 1117, 1118 n.2 (6th Cir. 1990) (citing *Caminetti* v. *United States*, 242 U.S. 470, 486 (1917)); *Independent U.S. Tanker Owners Comm.* v. *Skinner*, 884 F.2d 587, 596 (D.C. Cir. 1989) (citing *Garcia* v. *United States*, 469 U.S. 70, 76 n.3 (1984)), *cert. denied*, 110 S. Ct. 1922 (1990); *United States* v. *Meyer*, 808 F.2d 912, 915 (1st Cir. 1987); *In re George Rodman, Inc.*, 792 F.2d 125, 128 & n.8 (10th Cir. 1986); *Solis-Ramirez* v. *United States Dep't of Justice*, 758 F.2d 1426, 1430 (11th Cir. 1985).

Other circuit courts recognize that they must examine the legislative history of even a seemingly plain law to insure that a literal reading of the statute does not conflict with a "'"clearly expressed legislative intention to the contrary."'"[21] Where the plain words of a statute conflict with clear, contemporaneous expressions of congressional intent in the legislative history, these courts have given effect to Congress's intent and restricted the literal reach of broad statutory language to the domain over which Congress intended the statute to operate.[22] In our view, this Court's decisions support this latter approach,[23] but it is obvious that judges on many circuits disagree. This Court should grant certiorari both to correct the clear error of the Fourth Circuit and to give further guidance to lower courts about the appropriate use of legislative history.

C. The Fourth Circuit's Insupportable Reading of the Statute Will Have Far-Reaching Consequences for the Railroad Industry.

The Fourth Circuit's decision to bring railroad workers within the coverage of the BLBA is not only mistaken concerning an important issue of statutory construction; its decision will also have far-reaching consequences for the railroad industry, by subjecting that industry to black lung claims from large numbers of em-

---

[21] *United States* v. *South Half of Lot 7*, 910 F.2d 488, 489 (8th Cir. 1990) (en banc) (quoting *United States* v. *James*, 478 U.S. 597, 606 (1986)), *cert. denied*, 59 U.S.L.W. 3652 (U.S. Mar. 25, 1991) (No. 90-1069); *Berger* v. *Heckler*, 771 F.2d 1556, 1570-71 (2d Cir. 1985); *Paskel* v. *Heckler*, 768 F.2d 540, 543 (3d Cir. 1985) (holding that, despite the "plain meaning" rule, "it is *always* appropriate to look to the legislative history to help interpret a statute" (emphasis added)); *Monterey Coal Co.* v. *Federal Mine Safety & Health Review Comm'n*, 743 F.2d 589, 595 (7th Cir. 1984); *Heppner* v. *Alyeska Pipeline Service Co.*, 665 F.2d 868, 870-872 (9th Cir. 1981).

[22] See, *e.g.*, *Rod Warren Ink* v. *Commissioner*, 912 F.2d 325, 327 (9th Cir. 1990); *West* v. *Kerr-McGee Corp.*, 765 F.2d 526, 529-30

ployees involved in the transportation of coal, the principal commodity transported by rail. Those employees constitute a substantial part of the railroad work force. By subjecting railroad workers' claims to a test based on the first sentence of the definition of "miner"—that is, by sweeping railroad workers doing regular railroad work into the category of mine employees "who were involved 'in the extraction or preparation of coal'" (the "function test") and "who worked 'in or around a coal mine'" (the "situs test") (Pet. App. 5a)—and ignoring Congress's express intent to exclude railroad workers from BLBA coverage, the Fourth Circuit erroneously expanded the scope of the BLBA to large numbers of railroad employees, a category of workers Congress never intended to reach.

The Fourth Circuit suggested that the impact of its decision might be limited because "the possibility of satisfying the situs requirement diminishes as the distance traveled on the rails increases, rendering the employment other than 'in or around a coal mine'" (Pet. App. 10a). But the court found that the "situs" test was satisfied in this case, even though the railroad carried the coal from the mine to a preparation plant 36 miles away. There is nothing in the Fourth Circuit decision that provides a basis for principled judgments based on the dis-

---

(5th Cir. 1985); *Miller* v. *Federal Mine Safety & Health Review Comm'n*, 687 F.2d 194, 195 (7th Cir. 1982) (Posner, J.); *United States* v. *Stauffer Chem. Co.*, 684 F.2d 1174, 1183 (6th Cir. 1982), *aff'd on other grounds*, 464 U.S. 165 (1984).

[23] See, *e.g.*, *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989); *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 284 (1987); *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981); *Steelworkers* v. *Weber*, 443 U.S. 193, 201-02 (1979); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10, 23-24 (1976); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 458-59 (1892).

tance travelled away from a mine site or preparation facility.[24]

The Fourth Circuit also suggested that the impact of its decision might be limited because "[a]fter the coal is prepared and reloaded for shipment, a railroad employee would not satisfy the function test." Pet. App. 10a. But whenever a railroad provides transportation of coal away from a coal facility, including processed coal hauled to consumers from preparation facilities and from integrated mining/preparation facilities, train crews must prepare their trains for their journey before they are loaded and, like Roberson, will perform the usual trainmen's tasks at the mine or preparation facility site: "coupling and uncoupling high pressure air hoses between cars, * * * setting and releasing brakes, and obtaining loading numbers and tags from the individual cars" (Pet. App. 3a). Thus it is difficult to see what meaningful limitations the Fourth Circuit intended to apply by virtue of the "function test," with respect to train crews serving coal mines and preparation facilities, and neither Roberson nor the federal respondent has any good basis for asserting that the decision "will impact on only a small group of railroad workers" (Roberson Br. in Opp. 11) or that the decision "is unlikely to have a significant impact on the railroad industry" (Fed. Resp. Br. in Opp. 6).[25]

---

[24] Indeed, respondent Roberson takes the position that the railroad trackage connecting a mine and a preparation facility is itself a "mine" under the statutory definition and the implementing regulations. Roberson Br. in Opp. 8-9. If that is the law, then railroad workers such as Roberson would be covered by the BLBA no matter how great the distance between mine site and preparation facility and no matter how minimal the amount of time spent at either end.

[25] Other circuits have held that "the loading operation [covered by the BLBA] * * * [is] not complete until the last piece of processed coal [falls] from the tipple" into the vehicle moving the coal away from the preparation facility. *Hanna* v. *Director, OWCP*, 860 F.2d 88, 93 n.7 (3d Cir. 1988); *Mitchell* v. *Director, OWCP*, 855 F.2d 485, 490 (7th Cir. 1988). Administrative law judges are

Nor does the decision limit itself to trainmen, such as Roberson. Other railroad workers—signal and section laborers, for example—perform tasks such as maintaining and repairing railroad signal systems and track in mine territory, including the mines and preparation facilities; such workers likewise can claim that they are involved in the transportation of coal.[26]

For these reasons, the Fourth Circuit's decision has implications for the railroad industry far beyond the facts of Roberson's own circumstances. If that decision is upheld, railroads will spend years litigating the correct application of the "situs" and "function" tests, which have no sensible application to railroad workers employed by common carriers and no basis in the statutory language or history so far as the railroad industry is concerned. The burdens of such claims and proceedings would be necessary had Congress intended to impose them, but it did not. Congress did not intend to apply the BLBA to the railroad industry. This Court should act promptly to return the BLBA to its intended domain.

---

already rejecting the need to apportion the time a railroad worker spent at a preparation plant between the time spent near raw coal and time spent near processed coal. *E.g.*, *Schoener* v. *Consolidated Rail Corp.*, No. 88-BLA-02125, mem. op. 9 (Dep't Labor ALJ Decision & Order Awarding Benefits Oct. 26, 1990), *appeal docketed*, No. 91-347 (Benefits Rev. Bd. Nov. 13, 1990).

Contrary to what may appear from the Fourth Circuit's discussion of *Eplion* v. *Director, OWCP*, 794 F.2d 935 (4th Cir. 1986) (Pet. App. 5a), *Eplion* does not limit the potentially broad reach of the *Roberson* decision. In *Eplion* the coal had been processed completely at another facility before its transportation to the place where Eplion worked. Thus, *Eplion* would not prevent a rail worker whose only exposure to coal dust was at a preparation plant from claiming an entitlement to benefits under the *Roberson* decision's "situs" and "function" tests.

[26] See, *e.g.*, *Eldridge* v. *Interstate R.R.*, No. 88-BLA-1870, mem. op. at 5 (Dep't Labor ALJ Decision & Order Awarding Benefits Mar. 27, 1990) (section laborer who repaired track and switches at an apparently integrated mining/preparation facility was "involved [in] working with coal which was being processed"), *appeal docketed*, No. 90-1356 (Benefits Rev. Bd. Apr. 26, 1990).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

ROBERT W. BLANCHETTE
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2500

RALPH J. MOORE, JR.*
JOHN TOWNSEND RICH
ALOK AHUJA
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for the Association of American Railroads

April 19, 1991

* Counsel of Record

Supreme Court, U.S.
FILED
APR 23 1991
OFFICE OF THE CLERK

No. 90-1271

In The Supreme Court of the United States October Term, 1990

NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner,

v.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

JAMES S. WHITEHEAD
(Counsel of Record)
LINZEY D. JONES
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

WILLIAM B. POFF
CLINTON S. MORSE
WOODS, ROGERS & HAZLEGROVE
Post Office Box 720
Roanoke, VA 24004-0720
(703) 982-4200

DOUGLAS A. SMOOT
JACKSON & KELLY
Post Office Box 553
Charleston, WV 25322
(304) 340-1000

Counsel for Petitioner

Date: April 24, 1991

American Reprographics Management, Inc.™ (312) 332-ARMI

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

CASES *Page*

Hanna v. Director, OWCP, 860 F.2d 88 (3d Cir. 1988) 5

Louisville & N. R.R. v. *Donovan*, No. 80-0611-L(G), *vacated on other grounds*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) 5

Mitchell v. Director, OWCP, 855 F.2d 485 (7th Cir. 1988) 5

Public Citizen v. *United States Dep't of Justice*, 491 U.S. 440, 105 L.Ed.2d 377 (1989) 2

Southard v. *Director, OWCP*, 732 F.2d 66 (6th Cir. 1984) 5

Stroh v. *Director, OWCP*, 810 F.2d 61 (3d Cir. 1987) 5

West Virginia Univ. Hosp., Inc. v. *Casey*, 59 U.S.L.W. 4180 (U.S. March. 19, 1991) 2

STATUTES AND OTHER AUTHORITIES

Black Lung Benefits Act § 402(d), 30 U.S.C. § 902(d) (1988) ..... *passim*

123 Cong. Rec. 24,239 (1977) 3

H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 308-309 4

S. Rep. No. 209, 95th Cong., 1st Sess. (1977) 3

No. 90-1271

In The
Supreme Court of the United States
October Term, 1990

NORFOLK AND WESTERN RAILWAY COMPANY
Petitioner,

v.

OLEN ROBERSON, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

As Petitioner, Norfolk and Western Railway Company ("NW"), and the Association of American Railroads ("AAR"), as *amicus curiae,* have demonstrated, this Court should grant the petition and review the Court of Appeals' manifestly erroneous interpretation of Section 402(d) of the Black Lung Benefits Act ("BLBA"), 30 U.S.C. § 902(d) (1988). The Court of Appeals' expansion of BLBA coverage to include common carrier railroad workers employed in the movement of coal in interstate commerce is not supported by the language of the Act and is patently contrary to the Act's purpose and legislative history. NW, along with the rest of the railroad industry, potentially will be exposed to thousands of claims for benefits from the large number of

railroad workers engaged in the movement of coal at or around mine sites and preparation facilities as a result of this erroneous decision.

Both the Federal Respondent and Respondent Roberson argue that the Court of Appeals' interpretation of "miner" to include railroad employees engaged in the interstate transportation of coal is consistent with the plain language, the legislative history, and Congress' purpose in enacting the statute. Both Respondents also deny that this case presents an issue of sufficient public importance to merit review. They, like the Court of Appeals below, are in error.

1. The Court of Appeals' erroneous interpretation of Section 402(d) of the BLBA is not supported by any permissible application of the "plain meaning" rule of statutory construction, as Respondents urge. Fed. Resp. Br. at 6-8; Roberson Br. at 7-8. It is certainly not self-evident that Congress intended the phrase "an individual who works or has worked in . . . transportation in or around a coal mine" to encompass an employee of a common carrier railroad who is present at a mine site or preparation facility solely to move coal away from such locations by means of instrumentalities of interstate commerce. The phrase is, at best, ambiguous. Neither Respondent nor the Court of Appeals has shown that it has a "clearly accepted meaning in both legislative and judicial practice." *Contrast West Virginia Univ. Hosp., Inc.* v. *Casey,* 59 U.S.L.W. 4180, 4184 (U.S. March. 19, 1991).

Moreover, examination of the legislative history and Congress' purpose in enacting the BLBA is essential to an accurate understanding of the statute's meaning, as this Court has repeatedly declared. *See, e.g., Public Citizen* v. *United States Dep't of Justice,* 491 U.S. 440, 105 L.Ed.2d 377, 391-92 (1989):

> As we said in *Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 459 (1892), "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe

> that the legislator intended to include the particular act."
>
> . . . Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co.* v. *United States,* 278 U.S. 41, 48 (1928) (Holmes, J.).

In hiding behind its invocation of "plain language", the Court of Appeals erroneously substituted its uninformed understanding of Congress' intent for that clearly expressed in the relevant legislative history.

2. The legislative history and purpose of the BLBA are flatly inconsistent with the Court of Appeals' decision. Congress cannot have spoken more directly. Both the key Congressional Report and the explanatory statement of the Act's leading spokesman, Senator Randolph, establish that, in including certain "transportation" workers within BLBA's coverage in the 1977 Amendments, Congress did not intend to encompass traditional railroad employees. *See* Petition at 10-12.

The Federal Respondent acknowledges, as he must, that the Senate Committee Report and the statement of Senator Randolph "speak restrictively of the contours of the amended definition's coverage of transportation workers." Fed. Resp. Br. at 9. In fact, the Senate Report states precisely that "[t]he [expanded definition of 'miner'] does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line unless such company also operates a mine." S. Rep. No. 209, 95th Cong., 1st Sess. 20-21 (1977). Senator Randolph emphasized this exclusion during floor debate: "Railroad, trucking, bargeline, and coke oven workers are not included in the definition [of 'miner']." 123 Cong. Rec. 24,239 (1977).

Nonetheless, the Federal Respondent, like the Court of Appeals below, would have this Court ignore these direct manifestations of Congress' intent to exclude rail workers from

the Act's coverage on the sole ground that there was no similar reference to rail employees in the Conference Report accompanying the 1977 Amendments. However, the language of that report establishes that the Conference Committee fully embraced the scope of the Senate bill, with its carefully crafted coverage provision and its exclusion of railroad workers: "The conference substitute conforms generally to the Senate amendment . . . ." H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 15 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 308-309. Neither Respondents nor the Court of Appeals below offers any evidence that the Conference Committee intended *sub silentio* to expand the definition of "miner" beyond that proposed by the Senate so as to include railroad employees. The only change to the Senate language made in conference was the addition of "an amendment to clarify that transportation and construction workers are covered only to the extent they work in or around a coal mine and are exposed to coal dust." *Ibid.* Thus, the Conference Committee, far from broadening the Senate's definition of "miner", narrowed that definition by clarifying the limited circumstances in which any "outside" transportation and construction workers can qualify for BLBA benefits.

3. Respondents' argument that inclusion of railroad workers under the BLBA is consistent with Congress' purpose in providing this federal benefit program flatly ignores the entire 20-year history of the Act. Congress initially enacted, and subsequently reenacted, the BLBA solely because of the perceived inadequacy of *state* workers' compensation programs for coal miners. Petition at 7-8. There is no evidence in the legislative history of the BLBA that Congress has ever expanded the coverage of the statute because of any perceived inadequacy in the panoply of *federal* health and welfare statutes covering railroad workers. *See* Petition at 9-10.[1]

4. The Federal Respondent asserts at page 7 n.4 of his Brief in Opposition that the decision below is consistent with previous decisions that have found various transportation workers to fall

---

[1] Respondent Roberson suggests, at pages 5-6 of his Brief in Opposition, that Congress may well have intended to supplement federal health and welfare benefit programs for railroad workers by including them within BLBA's coverage. Notably, he cites to nothing in the Act's extensive legislative history to support any such conclusion.

within BLBA coverage. In fact, however, the cited decisions are inapposite; none involved a BLBA claim by a rail worker[2] against a railroad;[3] in none was the issue of Congress' intent with respect to the coverage of the rail industry under the BLBA even discussed. The only federal court that has directly decided this question,[4] apart from the Court of Appeals below, has rejected the interpretation of "miner" reached in this case by the Fourth Circuit.

5. Finally, Respondents seek to minimize the importance of the Court of Appeals' decision on the ground that "only a small group of railroad workers" will be benefited. Roberson Br. at 11; *see also* Fed. Resp. Br. at 6. There are already at least 174 pending BLBA claims against NW and other railroads throughout the industry. If the Court of Appeals' precedent-setting decision bringing the railroad industry within the Act's coverage is allowed to stand, any rail employee even remotely involved in the movement of coal from a mine site or processing plant or over the rail lines in between may well file a claim for black lung benefits.

The Federal Respondent is in error when he suggests that the "demanding tests of function and situs" (Fed. Resp. Br. at 13 n.7) will result in a narrow application of the BLBA to the

---

[2] *See, e.g., Hanna* v. *Director, OWCP,* 860 F.2d 88 (3d Cir. 1988) (tug boat deck hand); *Stroh* v. *Director, OWCP,* 810 F.2d 61 (3d Cir. 1987) (self-employed trucker); *Southard* v. *Director, OWCP,* 732 F.2d 66 (6th Cir. 1984) (trucker employed by coal retailer).

[3] The Federal Respondent's description of *Mitchell* v. *Director, OWCP,* 855 F.2d 485 (7th Cir. 1988), at page 7 n.4 of his Brief in Opposition, as a case involving a "railroad employee" is potentially misleading. While the employee in question in *Mitchell* was technically employed by a railroad, the BLBA claim was brought by his widow against Old Ben Coal Company, not against the railroad. The Seventh Circuit, in upholding his claim against Old Ben, focussed on the fact that Mitchell was *de facto* an employee of the coal company during the period he cleaned railroad cars, finding that he "worked under the direction of Old Ben employees at Old Ben's mine site and on Old Ben's time schedule." *Id.* at 490. Thus, the issue of the application of the BLBA to traditional railroad employees, such as Roberson, was not considered by the court.

[4] *Louisville & N. R.R.* v. *Donovan,* No. 80-0611-L(G) (W.D. Ky. 1981) (Pet. App. 11a-16a), *vacated on other grounds,* 713 F.2d 1243 (6th Cir. 1983), *cert. denied,* 466 U.S. 936 (1984).

rail industry. In this case, Olen Roberson was found to have satisfied the "situs" test even though he was involved in the movement of coal over 36 miles of interstate rail line between a coal mine and a preparation plant. NW has thousands of employees similarly involved in the transportation of coal between coal mines and preparation plants.

The so-called "function" test provides no meaningful limitation either, encompassing, as the Fourth Circuit has ruled, such traditional preparatory train movement activities as "coupling and uncoupling high pressure air hoses between cars, . . . setting and releasing brakes, and obtaining loading numbers and tags from the individual cars" when they occur at either coal mines or processing facilities. Pet. App. 13a. There are thousands of employees throughout the rail industry who are engaged in such activities at preparation plants in connection with the transportation of shipments of processed coal to ultimate consumers and, according to the Fourth Circuit, have contact with coal before it is finally "prepared and reloaded for shipment." Pet. App. 10a. *See generally* AAR Br. at 15-18.

NW and other railroads should not be burdened with BLBA claims and proceedings where the statutory language and history of the Act provide no basis for including railroad workers within its coverage. Congress did not intend for the BLBA to apply to the railroad industry. This Court should halt the erroneous expansion of the BLBA triggered by the Court of Appeals' decision and limit the BLBA to its Congressionally intended beneficiaries.

CONCLUSION

For the reasons set forth herein and in NW's petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

JAMES S. WHITEHEAD
(Counsel of Record)
LINZEY D. JONES
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

DOUGLAS A. SMOOT
JACKSON & KELLY
Post Office Box 553
Charleston, WV 25322
(304) 340-1000

WILLIAM B. POFF
CLINTON S. MORSE
WOODS, ROGERS & HAZLEGROVE
Post Office Box 720
Roanoke, VA 24004-0720
(703) 982-4200

Counsel for Petitioner

Date: April 24, 1991